UNIVERSITY OF TORONTO
FACULTY OF LAW

PROPERTY LAW
SMALL GROUP PROPERTY D 2021-2022

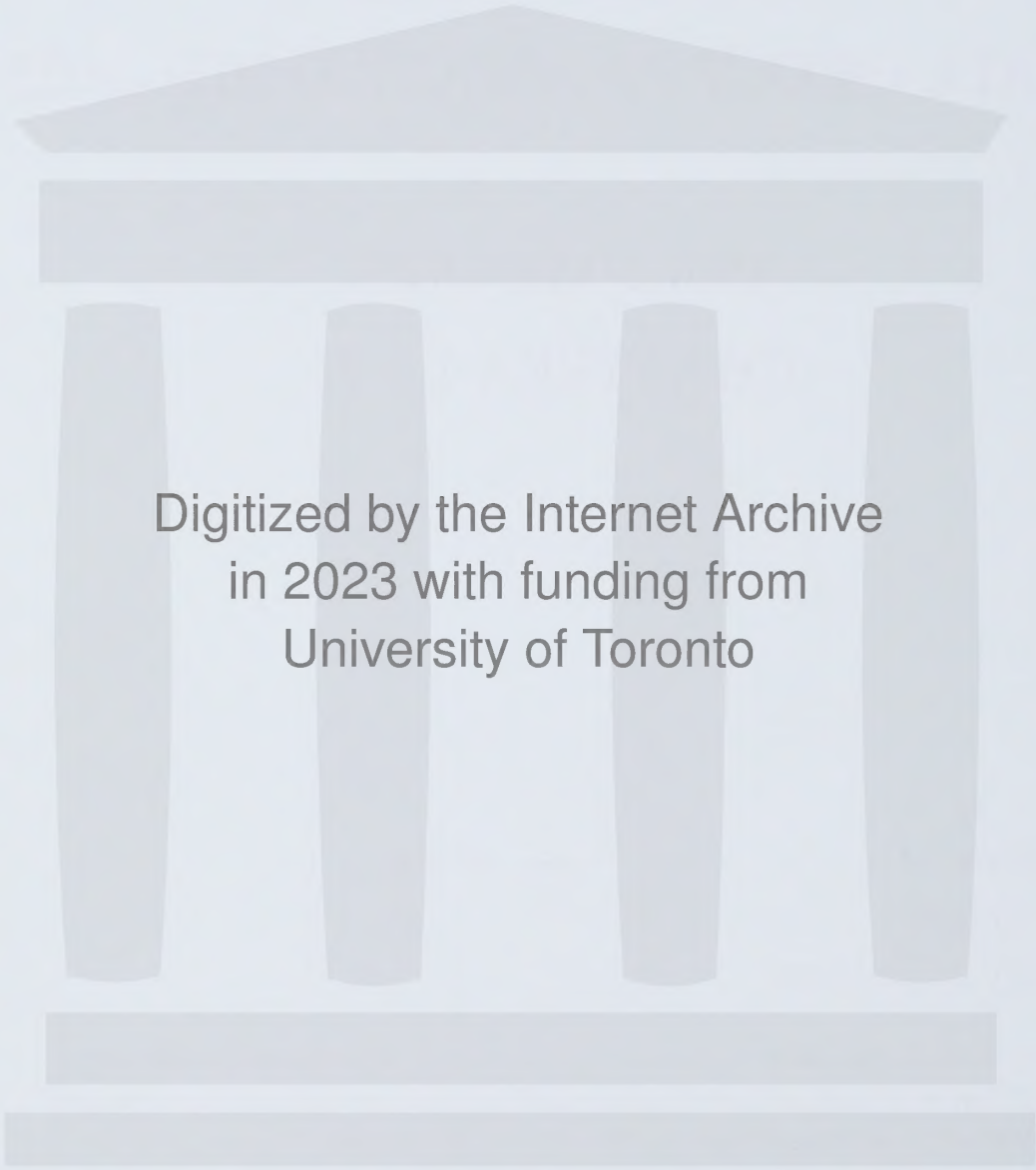
VOLUME ONE
CHAPTERS 1 – 7

Jim Phillips
Faculty of Law
University of Toronto

PROPERTY LAW
SMALL GROUP PROPERTY D 2021-2022

VOLUME ONE
CHAPTERS 1 – 7

Jim Phillips
Faculty of Law
University of Toronto



CONTENTS – VOLUME 1

CHAPTER 1: PROPERTY IS RIGHTS NOT THINGS

CHAPTER 2: WHICH RIGHTS IN WHICH THINGS, AND WHY?

CHAPTER 3: POSSESSION AND TITLE AT COMMON LAW

CHAPTER 4: THE COMMON LAW OF REAL PROPERTY

CHAPTER 5: CO-OWNERSHIP IN THE COMMON LAW

CHAPTER 6: SERVITUDES PART 1 - EASEMENTS

CHAPTER 7: SERVITUDES PART 2 - RESTRICTIVE COVENANTS

CHAPTER TWO

WHICH RIGHTS IN WHICH THINGS, AND WHY?

INTRODUCTION

This chapter is about novel claims for property rights. That is, the cases involve courts deciding whether to award property rights in certain things to certain individuals. Some involve claims to a substantial bundle of rights, others to a more limited number of strands. In some cases the contest is essentially between private claimants, in others the thing in question will either be subjected to a private property regime or a common property one. These cases reveal that Macpherson is correct to suggest that "property" is a changing concept. In reading them it might also be useful to bear in mind, even if you do not agree with it, Macpherson's further assertion that the concept of property is a "purposeful" one, that its meaning alters over time because of changing conceptions about how social interests may best be served.

In a part of his "Introduction" not reproduced in chapter one, Macpherson expands on his statement that although property is an enforceable claim to the use or benefit of something, private property rights - the exclusion of some from the use of resources - do not rest on force or the threat of force alone. He points out that all societies provide ethical justifications for private property. He states:

Property is controversial ... because it subserves some more general purposes of a whole society, or the dominant classes of a society and these purposes change over time: as they change, controversy springs up about what the institution of property is doing and what it ought to be doing. [Thus] ... the institution ... of property is always thought to need justification by some more basic human or social purpose. The reason for this is implicit in two facts we have already seen about the nature of property: first, that property is a right in the sense of an enforceable claim; second, that while its enforceability is what makes it a legal right the enforceability itself depends on a society's belief that it is a moral right. Property is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right. This is simply another way of saying that any institution of property requires a justifying theory. The legal right must be grounded in a public belief that it is morally right. Property has always to be justified by something more basic; if it is not so justified, it does not for long remain an enforceable claim. If it is not justified, it does not remain property.

Macpherson's argument that the award of a property right to an individual needs to be justified is why the title to this chapter includes the last word – why?

Even within a system like ours in which it is acknowledged that private property provides the dominant means of resource allocation, two kinds of problems may emerge. First, someone may claim that a particular thing, not hitherto considered to be a suitable subject for private property, should now be held to be so. The courts must then grapple with whether to allow the claim, as well as to what extent and on what basis. This is the kind of problem that is at issue in the cases in this chapter. Second, even when it is acknowledged that a thing is or should be the subject of private

property, there may be questions about the extent of private rights. It was this second kind of question that was at issue in *Harrison* v. *Carswell* and it emerges also in some of the cases in this chapter.

Before we get to the cases it is useful to think generally about some of the arguments that emerge, explicitly or implicitly, in the cases. In "Property and the Right to Exclude," (1998) 77 Nebraska L. R. 730, T.W. Merrill identifies two principal approaches in cases about whether something is or should be property. One is what can be best described as an "essentialist" approach. This assumes there are essential attributes, or just one essential attribute, to property, and thus one or more of these attributes must be present in order for a court to say that a person has "property" in a thing. Must one be able to transfer something to another, for example, in order to have property in it? The difficulty with essentialist arguments, of course, is that, as Holmes J. points out in the *INS* v. *AP* case, most of these "attributes" come from the law itself. Merrill, for example, argues that the right to exclude is an essential and thus necessary attribute of property; yet the right to exclude, as we saw in *Harrison* v. *Carswell*, is a right given by law. It does not, putting aside the use of physical force, arise outside of law.

The alternative to what Merrill calls an "essentialist" approach is what he terms a "nominalist" approach - a person has property in a thing because the court or legislature says that he or she does. No attribute such as transferability is either necessary or sufficient for calling something "property." Decision makers call something property in order to pursue some underlying policy objective. Certain attributes then flow from the designation of property, they are not the cause of that designation.

You can find both essentialist and nominalist arguments in most of the cases extracted below. You can also find, in essentialist arguments, different rationales for why some particular essential aspect should be the one that matters, and in cases that take a nominalist approach you can also find different policy objectives.

This essentialist/nominalist distinction also frequently tracks the variety of justifications for private property that political and legal theorists have offered. While many of these theories are intended to justify the very fact of private property, we are not concerned with the institution of private property as such. It may or may not be a good idea, but it is here, and here to stay into the foreseeable future. But acknowledging that fact does not give us an answer to all questions about the nature and extent of property rights. Hence when we are presented with a novel claim, a case not simply resolvable by the use of legal precedent, courts often use versions of these justifications for, and/or theories about, property rights, explicitly or implicitly.

This is not to say that any particular theory, or any combination of theories, necessarily explains why property law has taken the form that it has. I do not offer my own prescriptions here, am not putting forward any particular conception of what is right. Indeed, it is my view that particular socio-political contexts are likely much better at explaining results than any abstract theory.

The principal justifications supporting private property as a system, or for awarding property rights

to particular people over particular things are: that it rewards labour, that it advances social utility, that it is economically efficient, and that it promotes human freedom and flourishing. I will discuss these very briefly here.

One of the most commonly-cited justifications for private property is that it reflects the rewards of labour. The theory goes back to John Locke, and is variously referred to as the Lockean, or labour, or desert, theory. Locke argued that while originally "God ... hath given the World to Men in common ... for the Support and Comfort of their being", individuals had a natural right to their own labour. When that labour was mixed with a thing, the thing was removed from the state of nature and became the property of the individual who had worked with it. It was this process which transformed common property into individual property. Locke stated: "the grass my horse has bit, the turfs my servant has cut, and the ore I have digged in any place where I have a right to them in common with others, become my property without the assignation or consent of anybody. The labour that was mine, removing them out of that common state they were in, has fixed my property in them". Locke appended a number of qualifications and additions to this justificatory theory, to deal with the problems of limited resources and inequality of property ownership. But we are not concerned with studying Locke, only with the general idea of awarding property rights as a reward for labour. You should look for this labour theory in particular in *INS* v. *AP*, and it also arises in *Caratun*. It is employed in those cases to argue that a "thing" not hitherto considered a suitable object of private rights in property should become so.

A second principal theory about when to award private property rights is the principle of utilitarianism. This originally derived from Jeremy Bentham, who argued that the guiding principle of all social organisation should be the principle of utility - the greatest happiness of the greatest number, with happiness being measured by the excess of pleasure over pain. More particularly, happiness was said to consist of subsistence, abundance, equality and security. Bentham recognised that there could be conflicts between these ends, and he argued that subsistence and security were more important than the other two, with security pre-eminent. He stated: "unless laws are made directly for security, it would be quite useless to make them for subsistence. You may order production; you may command cultivation; and you will have done nothing. But assure to the cultivator the fruits of his industry, and perhaps in that alone you will have done enough". Thus security in the form of private property was needed to ensure subsistence.

That was how Bentham justified the fact of private property. In addition, he accepted as inevitable its corollary - inequality. While Bentham thought that equality in property was a contributor to happiness, he saw it as a distinctly lesser goal: "We cannot arrive at the greatest good, except by the sacrifice of some subordinate good .... Equality ought not to be favoured except in the cases in which it does not interfere with security .... If all property were equally divided, ... the sure and certain consequence would be, that presently there would be no property to divide. All would shortly be destroyed .... If the lot of the industrious was not better than the lot of the idle, there would be no longer any motives for industry". Bentham, however, did not simply advocate the untrammelled pursuit of acquisition. He stated that "the laws ought to do many things for subsistence which they ought not to attempt for the sake of abundance". Thus utilitarianism can in principle support some limits on the extent of private property ownership, up to and including a

community power of expropriation, although such a policy affects the security aspect of utility.

Utilitarians offer no particular prescription for what a property regime should look like. Rather, utilitarianism says that we should employ the principle of utility as a standard against which to measure property rules. There is what might be called a kind of cost benefit analysis method of deciding where property rights should be allocated. What that method reveals should be worked out on a case by case basis; utilitarianism never requires any particular kind of answer. Utilitarian approaches emerge in some of the cases below, in *INS* v. *AP* and in *Stewart* in particular, and one might call the argument that the wife should have been seen as having a property right in her former husband's dental licence a utilitarian one, for awarding her some right would advance the social policy of economic equality between spouses on divorce.

The law and economics school argues that the market is the most efficient mechanism for the production and allocation of resources, and therefore it produces the widest level of economic satisfaction for individuals. A society's property regime should therefore incorporate maximum levels of exclusivity (make all things capable of private ownership), uses (which enhances value), and transferability (which increases exchange). Most law and economics scholars assume that all people are rational wealth maximisers, and that the market will move resources to those who value them most. Market efficiency would presumably support at least as broad a right of property as the common law currently provides.

A common tale told by advocates of full market freedom is the "tragedy of the commons". If land is available for grazing to all, there will be an incentive for one farmer to place as many cows as possible on it, because he or she will gain out of all proportion to the loss of grazing space, which will be borne by all. But when all farmers behave this way, the finite resource will be used up and no pasture will be available for anybody. The law and economics answer is privatization, which provides an incentive to conserve for the future because the consequences of over-grazing are not shared by all. An alternative view offered by some is that the tragedy of the commons is not caused by common property as such, but by unregulated uses of it. That is, it is a tragedy caused by untrammelled private rights. People who make this argument also point out that it is not only a common property regime that leads to exhaustion of a resource. Private property allows this just as much. Thus critics of the pro-privatization argument point out that it is empirically incorrect to assume that private owners would not exhaust the resource for their own gain without regard to the future.

Note here that a second version of "law and economics" also assumes that people are rational wealth maximisers, but is concerned not so much to prescribe a legal regime as to describe the consequences of legal rules. That is, it asks what people are likely to do in response to a given rule and suggests that courts and legislatures take into account such likely responses in formulating the rules in the first place. This school might say that *INS* v. *AP* is correctly decided because unless some protection is given to the producers of news copy there would be no incentive to go on producing it.

Finally, note also that not all economists believe in having private property in all commodities.

While some do argue that child adoption systems or organ donation should be left to the market, others are persuaded that for these transactions and their ilk other considerations matter, beyond efficiency.

Some justify private property because it enhances human freedom and moral development. There are various versions of this. In one version we simply have a claim that private property gives the citizen freedom from state intervention and thus more individual autonomy. This is, in a sense, the flip side of the argument noted below that property confers power as against the non-propertied; it also confers power as against the state. While there is an obvious truth to the general assertion of a relationship between private property and state power, critics point out (1) that this is freedom for the few, not the many, and (2) that the argument ignores the fact that the state does intervene to protect private property. Thus far from being constrained by private property, the state is delegating its power to property holders.

Another version of the "human freedom and development" theory starts with Hegel, who argued that private property - the ability to control resources - allows humans to exert their will over the external environment and in the process to demonstrate their individuality. Indeed it was this assertion of dominance over things which liberated the personality, made human beings human. Hegel believed that all things should be capable of being made the subject of private property rights. While Hegel's theory is difficult to link to particular debates in property law, it does provide a general justification for private property and, therefore, for particular grants of it in particular cases.

Some contemporary scholars have accepted the idea that control over external resources is necessary for personhood, but have argued that there is a distinction between basic entitlements (food, housing etc) and property acquired and used for exchange. The personhood argument, they say, does not justify the latter. But it may justify, in this chapter, awarding some limited property right in a licence to practice dentistry to a non-qualified spouse (*Caratun*).

Cutting across all or most of the theories noted above, or treating them as only part of the story, are commentators who start from the position that, in Macpherson's words, "any system of property is a system of rights of each person in relation to other persons" and that property rights "carry with them, when they are held in quantities larger than an individual can work by himself, a power to control in some measure the lives of others". Property is power. The legal realist Morris Cohen made this point nearly a centiury ago, and went on to say that merely to recognise that private property is power is not necessarily to conclude that it is a bad thing. Rather, recognising the fact also demands recognition of a corollary fact: "it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government". (M.R. Cohen, "Property and Sovereignty" (1927) 13 *Cornell Law Quarterly* 8.) Thus a factor that for some enters into the utilitarian calculus is the need to reduce such private power. This consideration surely informs Brandeis' dissent in *INS* v. *AP.*, and perhaps underpins the "sales v subject" distinction laid out in the Glen Gould case.

Some people stress this power in terms of class, others in terms of gender or race. But all who are concerned with the link between property and power would argue for a regime of property rights

that limits the strands in the bundle of rights held by particular individuals. *Harrison* v. *Carswell* in chapter one, and *Re Noble and Wolf* in chapter four, are obviously susceptible to analysis on these kinds of grounds. In addition, attention to property as power might mean limiting a landlord's ability to set his or her own terms in the rental market - rent controls and security of tenure for tenants. Or it might mean insisting that one spouse (usually male) who participates in the waged economy does not keep all of the fruits of that participation, but must share them with a spouse (usually female) who performs domestic labour - family property legislation, see the *Caratun* case in this chapter. Or, most starkly, it might affect how one views the claims of Canada's Indigenous peoples to an aboriginal title in their lands. Or, to return to the residential tenancy example, it might mean prohibiting discrimination on racial grounds in the selection of tenants.

Before leaving the topic of theories of property, it should be stressed that there is no necessary correlation between a particular theory about property and the adoption of a particular political position. True, it may be difficult to be a proponent of efficiency theory and a believer in regulation of the market and redistribution of goods. But labour theory, for example, can be used both to support awarding property in the news to a large corporation (*INS* v. *AP)* and to justify giving a value to domestic labour, thereby addressing the complaints of feminists that our society fails to recognise the contribution that many women make to the domestic economy (*Caratun*). Similarly, personality theory is at least as much of an argument for all members of society having basic entitlements as it is for allowing unlimited acquisition by the few. Thus some theories are found in different guises at different points of the political spectrum.

****

PROPERTY IN THE NEWS

This case involves the issue of whether an individual can claim some property in newspaper copy. Two explanatory points should be made. First, two of the judgments discuss the applicability of copyright law to the case. You do not need to know any more about copyright law than what is reproduced in the judgments below. While the current Canadian law of copyright is different from what is stated here, the requirement for an element of "creation" and the general distinction between form (which the law protects) and content (which it does not) remain fundamental principles of the law of copyright.

Second, and more importantly, each judgment discusses "unfair competition". This is an area of the law involving judge-made rules which regulate market behaviour. Its principal, although not its only, component is called "passing off", a doctrine that states that one person may not "pass off" his or her goods as those of another. That is, if I make a car in my back yard it may not be advertised as a BMW. From passing off emerged the area of intellectual property law known as trademarks. If BMW has an established trademark, I also cannot place that mark on my product or in my advertisement, for that is functionally the same thing as making a statement about the product. A trademark is a recognised species of property in the common law, forming with copyright and patents the area known as intellectual and industrial property.

In *International News Service v. Associated Press (INS* v. *AP)* INS did not pass off its goods as those of AP. That is, it did not produce news copy and then try to sell it by stating that it was AP news copy. In fact, it did the opposite - it passed off AP's news copy as its own. Yet both the majority judgment of Pitney J., and the concurring opinion of Holmes J., state that AP wins the case on the grounds of unfair competition. The first question to consider is - how does each judgment do that? You will find this fairly easy to answer in Holmes' case. But it is a much more difficult question to answer from a reading of Pitney.

In seeking to answer that question about Pitney's majority judgement (note that it is the 'opinion of the court') one has to consider the relationship between "unfair competition" and property in news. Holmes is clear that there is no property in news. But Pitney is not. He says that there has been "misappropriation" here, and that it is that "misappropriation" which constitutes the unfair competition. But what exactly has been misappropriated? Can you misappropriate something unless you first decide that it is property? Pitney says that AP has something called "quasi-property" - but what is that? You might think in answering this last question about whether Macpherson would use the term "quasi-property" and, if not, how he would instead characterise Pitney's conclusions about the news as property?

Once you have worked out what the various judgments conclude, you should think about why, given that existing rules do not lead inevitably to those conclusions, the judges arrive at them. In particular, how would you categorise the rationales employed by Pitney and Brandeis in light of the introduction to this chapter dealing with justifications for property?

MATRIMONIAL PROPERTY

The next two cases concern the division of property between spouses following divorce. Although the regimes differ to some extent, all provinces since the 1970s have enacted legislation which gives each spouse a share in "matrimonial property" (or some such similar term) following divorce, irrespective of who actually owns the property. Before that legislation each party walked away with what he or she owned. That meant, of course, that usually the husband owned everything, the wife very little or nothing. The legislation essentially assumes that marriage is a partnership and each partner has an equal share in the property acquired during the marriage.

One of the questions that none of the legislation addressed precisely and comprehensively, and has thus been looked at many times by the courts in interpreting the Acts, is - what is property? See the definition in the Ontario Act reproduced in the *Caratun* case: "property means any interest, present or future, vested or contingent, in real or personal property."

At issue in the *V.* case was British Columbia's *Family Relations Act*, which provides that "family assets" are to be divided equally following divorce. "Family assets" are defined as "property owned by one or both spouses". Among the husband's assets at the time of the divorce was a dairy farm, and in the operation of that farm the couple produced milk according to their milk quota as allocated under the *Milk Industry Act*. At trial the wife was given a share in both the farm and the quota, the trial judge holding that the quota was "property" for the purposes of the *Family Relations Act*. The appeal judgment is a little confusing because it involves extensive reference to other cases dealing with whether different types of "quota" is property in different contexts. But that is a necessary by-product of the fact that the court in *V.* does not simply address the abstract question of "is quota property"?. Rather, it asks a contextual question - "is quota property in the area of property division on divorce?" This is important because, as you will see, the province's Court of Appeal had already ruled that milk quota was not property in the context of an expropriation claim.

The second case, *Caratun* v. *Caratun*, is also about family property, raising the question of whether a licence to practice dentistry should be characterised as "property" for the purposes of Ontario's *Family Law Act* (*FLA*). Similar to the BC Act, the Ontario *FLA* provides that property acquired by either spouse during a marriage is subject to a valuation and an equal division of its value at the end of the marriage. This equal division is to take place without any inquiry into "contribution". The *FLA* states that marriage is a partnership and that spouses are assumed to contribute to it and to the acquisition of any property equally, even if they do so in different ways.

Within both of these cases you will be able to discern both of what Merrill calls essentialist and nominalist approaches. Which do you find most persuasive?

****

CHAPTER THREE

POSSESSION AND TITLE AT COMMON LAW

INTRODUCTION: WHAT IS POSSESSION?

Although Macpherson distinguishes property and possession by saying that "[a]s soon as any society ... makes a distinction between property and mere physical possession it has in effect defined property as a right," possession is a crucial concept in the common law of property. While it is the case that you can have a right to property without possession, it is also the case that possession can be the origin of that right. It is partly so in the law of transfer of title in personal property law, for example. Title is transferred if there is a sufficient combination of intention to do so and "delivery," and delivery, where appropriate, is a transfer of physical possession.

More importantly, and this is what this chapter is about, in a number of contexts possession can lead to the acquisition of title/right without a transfer from another. At common law objects not previously owned (wild animals, or minerals, for example) become the property of those who first possess them. This is what the first case below, *Clift* v. *Kane*, is about.

In addition, objects owned but "lost" can become the property of those who find and possess them. This is the what the second and third cases, *The Tubantia* and *Popov* v. *Hayashi*, are about. The Tubantia arises out of a particular context in which title is divested by the property being lost - a shipwreck. The law of salvage permits the finder and possessor of the wreck to claim some property in it. *Popov* v. *Hayashi* deals with ordinary tangible objects which can be lost, although in that case it was not an ordinary baseball, it was a potentially very valuable one. Despite its value, the common law principle is the same as if we were dealing with something of as little monetary value as this casebook – if one person loses it, and another finds it and takes possession of it, that second person, the finder, acquires a title to it.

Obviously if the property we are referring to is not personal property but land, it cannot be "lost." But there is a functional equivalent in the law of real property, known as adverse possession. In the appropriate circumstances one person who has title can lose that title to another who acquires it through possession. I will say no more about it here, because there is a longer explanation of adverse possession later in this chapter.

You will note that throughout the above paragraphs I have used the word title, not ownership. Although ownership is the common and colloquial term we all use, in the common law we talk of title, for two reasons. First, as discussed below in the introduction to finders law, we will see that more than one person can have a title, and the winner in court will be the person with the best title as between those who are parties to a dispute. In short, title is relative. Second, as we will see in chapter four, in common law systems the crown theoretically owns all the land.

To this point I have said that possession can in a variety of contexts confer title on the possessor.

And while that is correct, by itself it is not that helpful a statement because to say that possession can give rise to title begs the next, much more important and often difficult question – what do we mean by possession? Thus in the first two cases we are not much concerned with whether the law ought to award title from first possession to sealers or to salvagers. *Clift* v. *Kane* and *The Tubantia* assume that possession will bring title but deal with the question of what constitutes "possession" in law for that purpose. One crucial point that they make is that "possession" means different things in different contexts. While "actual" possession, the physical control of an object, is invariably sufficient to say that one has legal possession, it is not necessarily required. Indeed in some instances it is impossible - how do you "hold" a ship which has sunk to the ocean floor? So in *The Tubantia* the question is - what do you have to do to be considered in possession of a wreck short of that?

In *Clift* v. *Kane* the defendant Kane had physical possession, in that the dead seals were on his ship, and the plaintiff Clift did not. But Clift was awarded the property rights that flow from first possession. The dissent would have awarded the rights to Kane, based on the idea that he had acquired "legal possession" earlier. Both judgments get to their conclusions using a mixture of precedent (as each judge understands it) and utilitarian arguments. One thing they disagree on is the role that "custom" and the specific circumstances of the Newfoundland seal industry should play.

Both *Clift* v. *Kane* and *The Tubantia* tell us about the importance of context - the nature of the property in question, the circumstances of its location, the nature of the "possessor's" activities, and the "custom" of the business.

Underlying the issue of what amounts to sufficient possession are, of course, some deeper questions. When a court holds that certain acts amount to sufficient possession in fact to award title in law, it does so for a reason (or reasons). Look for those underlying reasons in the judgments. They show us values which inform, indeed at times produce, the rules.

****

FINDERS OF PERSONAL PROPERTY

The context for our third case is the law of "finders." We will not deal generally with this area, but a brief introduction is necessary to make sense of the *Popov* v. *Hayashi* case.

Somewhat surprisingly to first year law students, in addition to first possession establishing a title, the law also allows a title to "finders" of "lost" objects. This principle is cited to a classic English case, *Armory v. Delamirie* (1722) 93 E.R. 664, in which a chimney sweep found a jewel and carried it to a goldsmith to have it valued. The goldsmith kept the precious stone, and the chimney sweep sued successfully for its return. The court promulgated the following rule: "That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the owner."

Note that the last phrase tells us that the chimney sweep had "a" title, not "the "title." His title was not as good as the original owner's, because the latter's was a prior title. The common law has a hierarchy of title according to chronology; title is relative. But in the absence of a claim from the "original" owner, the finder has a better claim, a better title, than anybody else.

Classic finders cases like *Armory* are not common, which is why we will not devote much time to them. But they do arise occasionally. In 1999 Constable Mel Millas of the Vancouver Police was walking his dog on his day off when the dog ran to a garbage can and started barking and sniffing around. Millas assumed he was after food, but then noticed a duffel bag in the can. The bag had a back pack inside it, and there was $1 million in the backpack. Millas turned the money in, but a police investigation could not locate the owner, presumably because the money was linked to crime in some way. Two claimants came forward but were held to be bogus. A third claimant also came forward, and was represented in court, but he would not reveal his identity and when the court insisted that he had to do so to have his claim adjudicated the lawyer gave it up.

Millas claimed the money; he would not have been able to claim it had he been on duty, because of police regulations. His claim was opposed by the police force, who argued that it would create an incentive for police officers to wait until they went off duty to "find" things. The court allowed his claim under the general rules of finding law.

As noted above, these cases are not common. And as a career choice finding a million dollars is probably very similar to buying lottery tickets, so you are advised to stay in school.

An exception to the rule that a finder only acquires a title that is relatively good - good against the whole world except the owner - comes when the original owner is considered to have abandoned the property. In that instance the finder is like the first possessor of an un-owned object - he or she has the best title. But abandonment is hard to establish and thus rare. It requires an intention to give up title, and mere loss does not convey such an intention. In *Simpson* v. *Gowers*, (1981), 121 D.L.R. (3d) 709 (Ont. C.A.) the Ontario Court of Appeal said: "Abandonment occurs when there is a giving up, a total desertion, and absolute relinquishment of private goods by the former owner." In its most recent case on the meaning of abandonment, *R.* v. *Patrick* [2009] 1 S.C.R. 579, the Supreme Court of Canada held that garbage set out for collection had been abandoned. Police

ADVERSE POSSESSION OF LAND: INTRODUCTION

As we will see in chapter 4, the common law maintains the fiction that the ultimate ownership of all real property lies in the Crown, and no individual can "own" land. Instead, individuals have "title" to land. Nowadays title is invariably asserted through a document - a conveyance or a will. But historically possession was a very significant part of the law of title. First, in and of itself it provided a method of acquiring title to unoccupied lands. At common law factual possession, including possession which has no obvious rightful origin, gave a title to the possessor. Second, possession also provided a method of proving title against other claimants, of reinforcing title. In the medieval period possession was called seisin, and seisin was "fact not right". It "expressed the organic element in the relationship between man and land and as such provided presumptive evidence of ownership": Gray, *Elements of Land Law*, p. 53. Possession, it is often said, was the root of title.

This initial description of title at common law would not be complete without also noting an important corollary of it - that title to land at common law is relative, just as we saw that it is with personal property. Title to land also cannot be absolute because the Crown owns all land, and therefore it was, and is, pointless to ask a court to decide who owns the land. Instead, one asks the court - of the two disputants before you, who has the better title? This can be illustrated by a simple example:

A owned land and sold it to B, who never occupied it; C occupied the land as vacant land; C was then forcibly dispossessed by D.

B, C, and D all have a title, but some titles are better than others. B's is best because it is first. But C also has a title by possession, could sue D for recovery of the land, and if C did so the court would not inquire into whether there was somebody out there with a better title than C. B must take an action on his or her own account. C may have had no "right" to occupy the land, but "a wrongful possessor will be able to defend his possession against trespassers and adverse claimants who have no better right": McNeil, *Common Law Aboriginal Title*, p. 15.

While it fulfills nothing like as significant a role as it once did, possession remains important in the common law of title to real property. It remains possible to acquire title to land at common law, good against all the world, through long possession. One way in which this can be done is through the doctrine of aboriginal title, dealt with extensively later in the course. But it can also be done at common law through the law of adverse possession.

Briefly, since the requirements for adverse possession are what the rest of this section is about, adverse possession means that uninterrupted enjoyment of land *of the correct nature* over *a period of time stipulated by law* by a squatter (non-owner) deprives the owner of his or her title and effectively gives to the squatter a title to the land, a title better than all others.

There are therefore two principal aspects of adverse possession law. The first is that of time. All jurisdictions in which it is possible to obtain title by adverse possession provide a statutory period during which a person claiming a title to land must act to recover the land from a wrongful

possessor. That is why the rules relating to adverse possession in Ontario are in the *Real Property Limitations Act*, RSO 1990, c. L-15. It replaced Part 1 of the old *Limitations Act*, which is the statute referred to in the cases, but did not alter any of the provisions. A claim of title by adverse possession is thus a defence to an action by someone with "paper title." Not all jurisdictions have the same time period. The following provisions tell you, *inter alia*, what the time period is in Ontario, and what "starts the clock running":

4) No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

This provision, and all the provisions in the *Real Property Limitations Act*, were drafted in the 1830s, and are hard to understand. You can make it comprehensible by leaving out some of the words, rendering it as follows:

4) No person shall ... bring an action to recover any land ... but within ten years next after the time at which the right to ... bring such action, first accrued ... to the person ... bringing it.

5) (1) Where the person claiming such land or rent, or some person through whom that person claims, has, in respect of the estate or interest claimed, been in possession or in receipt of the profits of the land, or in receipt of the rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, the right to make an entry or distress or bring an action to recover the land or rent shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession or at the last time at which any such profits or rent were so received.

Section 5 (1) is also a little obscure. Do the same exercise:

5) (1) Where the person claiming such land... has ... been in possession ... of the land ... and has ... been dispossessed, or has discontinued such possession ...the right to ... bring an action to recover the land ... shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession.

In fact read literally section 5 (1) is wrong. It can be read as saying that the limitation period starts to run on discontinuance of possession by the title owner. It does not. It begins, as does any cause of action, only when there is somebody to sue. If your land is empty you cannot, and do not need to, bring an action to recover it. There must be someone else in occupation against whom you can bring the action.

13) Where any acknowledgement in writing of the title of the person entitled to any land or rent has been given to him or to his agent, signed by the person in possession or in receipt of the profits of the land, or in the receipt of the rent, such possession or receipt of or by the person by whom the acknowledgment was given shall be deemed, according to the meaning of this Act, to have been the

possession or receipt of or by the person to whom or to whose agent the acknowledgment was given at the time of giving it, and the right of the last-mentioned person, or of any person claiming through him, to make an entry or distress or bring an action to recover the land or rent, shall be deemed to have first accrued at and not before the time at which the acknowledgment, or the last of the acknowledgments, if more than one, was given.

15) At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action the right and title of such person to the land or rent, for the recovery whereof such entry distress or action, respectively, might have been made or brought within such period, is extinguished.

16) Nothing in sections 1 to 15 applies to any waste or vacant land of the Crown whether surveyed or not, nor to lands included in any road allowance heretofore or hereafter surveyed and laid out or to any lands reserved or set apart or laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body, but nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922.

36) If at the time at which the right of a person to make an entry or distress, or to bring an action to recover any land or rent, first accrues, as herein mentioned, such person is under the disability of minority, mental deficiency, mental incompetency or unsoundness of mind, such person, or the person claiming through him or her, even if the period of ten years or five years, as the case may be, hereinbefore limited has expired, may make an entry or distress, or bring an action, to recover the land or rent at any time within five years next after the time at which the person to whom the right first accrued ceased to be under any such disability, or died, whichever of those two events first happened.

Note that while possession by the adverse possessor must be continuous for the period of time, this does not mean that the same person must possess the land for all of that time. Provided there is no gap in possession, the rights acquired by the potential adverse possessor, the "inchoate possessory title," can pass from one person to another so that at the expiry of the limitation period "the last successor being then in possession will acquire a title in fee simple good against all the world including the true owner": per Bowen C.J. in *Mulcahy* v. *Curramore Ply. Ltd.* [1974] 2 N.S.W.L.R. 464 (C.A.). See also McRuer C.J.H.C. in *Fleet* v. *Silverstein* (1963), 36 D.L.R. (2d) 305 (Ont. H.C.): "[T]here is abundance of authority that is binding on me that where there has been adverse possession by 'A' as against 'B' which is surrendered to 'C' and 'C' immediately enters into possession of a right which has been handed over to him by 'A' the Statute of Limitations continues to run against the true owner."

The converse to this is also well established: that is, that if a squatter abandons the land before the expiry of the limitation period the title holder "regains" full rights. He or she does not have to bring an action for recovery (there being no one in possession against whom to bring such action), nor will a later adverse possessor get the advantage of the previous possession unless his or her entry was substantially continuous with the previous squatter's departure: see *The Trustees, Executors and*

Agency Co. Ltd. v. *Short* (1888), 13 App. Cas. 793 (P.C. - N.S.W.).

You might think about how these points help to illustrate the introductory comments above about possession being the root of title and about the relativity of title. The "trespasser" who has not stayed the correct amount of time has still acquired something, even if it is not a title that can be passed on other than by the successor immediately possessing the land.

The existence, and indeed the value, of an "inchoate possessory title" is illustrated by *Perry* v. *Clissold,* [1907] A.C. 73 (P.C - N.S.W.). Under New South Wales expropriation legislation the government issued a notice of expropriation to one Frederick Clissold in 1891. Nothing further was actually done with the land, although the legislation provided that publication of the notice was sufficient to convey all rights in the land to the government, and Clissold died in 1892. In 1902 Clissold's heirs demanded compensation, but the Minister refused when it turned out that Clissold had entered the land in 1881. Although he fenced it and treated it as his own, and likely had sufficient "quality of possession" to obtain full title, he clearly did not have sufficient "quantity of possession" under the applicable statute. The case went to the Privy Council on the narrow question of whether a prima facie case for compensation was disclosed on the facts, and the court held that it was. "It cannot be disputed", Lord MacNaghten said, "that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner". The expropriation legislation provided for compensation "to every person deprived of the land" and "it could hardly have been intended ... that the Act should have the effect of shaking titles which ... would in process of time have become absolute ... or that ... Ministers ... should take advantage of the infirmity of anybody's title in order to acquire his land for nothing".

****

The following extract canvasses and critiques the arguments usually made for why we still have adverse possession. You might think it is a relatively little used doctrine today, but in 2019 and 2020 at least 8 adverse possession cases were decided by the Ontario Court of Appeal, and many others by the Superior Court.

ADVERSE POSSESSION: THE "QUALITY" OF POSSESSION

The next three cases explore what "quality" of possession is needed to establish an adverse possession claim. Generally, to make out the defense of adverse possession the squatter must show not only that he or she has been in continuous possession of the land for the requisite period of time, but also that the possession had been "actual possession" in the manner of an ordinary owner. "Actual possession," the first part of the test in the first case below, *Re St Clair Beach,* is usually broken down into a number of discrete but related elements: actual, continuous, exclusive, peaceful, adverse (without permission of the other or acknowledgment of the owner's title, and open or notorious). The word actual appears twice here - as the general requirement and as one of the specific elements of that requirement. When used in the latter instance it means "acts of possession" - did the trespasser do the kinds of acts on the land that an ordinary owner would do. It is like *factum* in personal property, and like *factum* is contextual.

Although the court does not come to a conclusion on the matter, it is likely that, if the title holder had gone out of possession, the MacDonalds would have been held to have sufficient "acts of possession." What arguments would you make that the McDonalds did physically possess the land as an ordinary owner would do?

The court finds that the defence cannot succeed because the McDonalds did not have exclusive possession. Why not? And what does this tell you about what the owner needs to do to remain in possession?

Even if the McDonalds had been in possession in a physical sense, and even if the title holders had discontinued possession, the McDonalds would probably still not have won. Why not? See s. 13 of the *Act*.

One final point of introduction is necessary here. It was stated above that adverse possession doctrine serves as a defence, specifically as a defence to an action by a title owner to recover land occupied by a squatter. However, in *Re St Clair Beach* the claim for possessory title is made affirmatively. In fact, there are many cases in which an affirmative claim is brought by a squatter, and even though there is very little direct authority on the point it is reasonable to say that there is no procedural difficulty in doing so. In any event, the affirmative claim is made in this case as a direct result of the operation of the land titles system. A few explanatory sentences on systems of recording title are therefore necessary here.

There are two such systems in common law Canada, although one is rapidly disappearing. The registry system, the oldest one, permits registration of all documents pertaining to land in the local registry office, but it does not require registration nor does it guarantee title. Prospective purchasers must therefore "search" the title by checking all the documents registered against a particular piece of land. By registering an owner protects title against all unregistered documents but not against unwritten unregistered claims such as title acquired by adverse possession. This system was historically in effect in the Maritime Provinces, southern Ontario (generally), and parts of Manitoba. It is being converted, with the aid of computerisation, into a Land Titles system in many places.

INTRODUCTION TO THE INCONSISTENT USE TEST: JUDICIAL REPEAL OF THE LIMITATIONS ACT?

Beginning in the 1970s a series of cases, in England and Canada, restricted the ambit of adverse possession doctrine by giving a new meaning to what makes possession "adverse". The traditional position can be summarised simply as a restatement of the principles outlined above: exclusive possession as an ordinary owner would possess for the statutory period of time is adverse to the title holder. Or, as it was put in *Treloar v. Nute* [1976] 1 W.L.R. 1295 (C.A.), "if a squatter takes possession of land belonging to another and remains in possession for ... [the statutory period] to the exclusion of the owner that represents adverse possession".

In the 1970s and 1980s three decisions from the Ontario Court of Appeal followed the general approach of the English courts, albeit modified, and established what has become known as the "inconsistent use" test for claims of adverse possession. That is, the squatter must use the land in a way "inconsistent" with the title holder's use. The first of these cases was *Keefer v. Arillotta* [1976] O.J. No. 2274. A narrow strip of land 8 feet wide by 105 feet deep running between the residential property of Keefer to the south and the business premises of Arilotta to the north. Arilotta owner the strip, and Keefer had a right of way over it. He used the strip as a driveway to get to this garage or, when the garage was converted to a storage shed, as a place to park. He also put gravel on the driveway at his own expense and kept it free of snow in the winter. In doing these things he was exceeding what he had a right to with the right of way. [We will discuss rights of way, a form of easement, in Chapter 6]. The evidence about the owner's use of the strip all pertained to the time when Arilotta's predecessor in title, one Cloy, owned it. Cloy closed his store every winter and went to Florida. When he was in Ontario Cloy made very limited use of the strip over the years. The trial judge awarded Keefer title to the strip.

At the Court of Appeal Wilson J.A. said: "The use an owner wants to make of his property may be a limited use and an intermittent or sporadic use. A possessory title cannot, however, be acquired against him by depriving him of uses of his property that he never intended or desired to make of it. The animus possidendi which a person claiming a possessory title must have is an intention to exclude the owner from such uses as the owner wants to make of his property." She stated that the test for adverse possession was the one given in *St Clair Beach Estates*, above, and that Keefer failed both the second and third branch of it. On the second branch she said: 'I do not believe that while the Cloys owned the strip of property in issue the Keefers ever intended to oust them from the limited use they wanted to make of it." Cloy did not "take any exception to the Keefers' parking their car in the driveway. Why would he, even if it were an excessive use of the right of way, if it did not impede him in the use he wanted to make of the property? His whole posture appears to have been that of an accommodating neighbour. I cannot find on the evidence that the Keefers' possession was with the intention of excluding the Cloys from the limited use they wanted to make of the property."

Wilson J.A. continued relative to the third branch: "As far as proof of the discontinuance of possession by the owner is concerned, I do not believe that the Cloys did discontinue their possession of any part of the strip of land other than the portion at the rear occupied by the respondents' garage.... However, as far as the balance of the strip is concerned, I think the owners made such use of it as they wanted."

Keefer is not entirely clear on what "inconsistent use" means. More clarity on that point comes from a case decided six years later. In *Fletcher v. Storoschuk* (1982), 35 O.R (2d) 722 (C.A.). a farmer had erected a fence 18 feet inside the boundary line in order to prevent his cattle wandering onto adjacent residential lots. The residential lots had originally also been part of the farm, but the farmer had sold them off; the lot in question had been bought in 1967, but not immediately developed.

The fence built by the farmer created a strip 18 feet wide and 200 feet long between the farmland and the residential property. In 1968, before he built on the residential lot, its owner planted spruce trees in the vacant strip, and also planted buckwheat on his own land and on the strip to keep the weeds down. He built a house on his lot in 1970, and later also a swimming pool. A dispute arose in 1978 when the farmer told the home owner to remove a cement pad he had installed on the 18 foot strip on which to place a filter for his swimming pool. He refused to remove the paid, the farmer sued, and lost. The trial judge found that there had been "open, notorious, constant, continuous, peaceful and exclusive" possession for over 10 years.

The farmer won on appeal. Wilson J.A. accepted the facts as to what the residential owner had done, but then said: "acts relied on to constitute adverse possession must be considered relative to the nature of the land and in particular the use and enjoyment of it intended to be made by the owner… The mere fact that the defendants did various things on the strip of land is not enough to show adverse possession. The things they did must be inconsistent with the form and use of enjoyment the plaintiff intended to make of it… Only then can such acts be relied upon as evidencing the necessary '*animus possidendi'* vis-à-vis the owner."

What was the use the farmer wanted to make of the land? It was "to establish the strip as a buffer zone between the field on which he was grazing cattle and his neighbours….This was the use he intended to make of it…. [A] person claiming a possessory title as against the legal owner must not only establish actual possession for the statutory period but he must establish that such possession was with the intention of excluding the true owner and that the true owner's possession was effectively excluded for the statutory period. In my view, the acts … performed on the strip of land by the [squatter] posed no challenge to the use of it intended by the [title owner]. They lacked that quality of inconsistency with the intended use of the owner required to constitute adverse possession."

Again, *Fletcher* is not as clear as it might be. In particular there is perhaps a problem with this passage: "The things they did must be inconsistent with the form and use of enjoyment the plaintiff intended to make of it… Only then can such acts be relied upon as evidencing the necessary '*animus possidendi'* vis-à-vis the owner." Is the inconsistent use test about exclusion or intention? In my view that question was resolved in the next case, from 1984.

CHAPTER FOUR

THE COMMON LAW OF REAL PROPERTY

THE DOCTRINE OF TENURE AND THE ESTATES SYSTEM

Although much of the system of tenure explained below is obsolete, a basic understanding of the historical origins of the English law of real property is indispensable to an understanding of the conceptual bases of that law in common law Canada. As in England, land "owners" in Canada are still not true owners, but are tenants in fee simple of the crown.

Starting with the next paragraph there is a description of the doctrines of tenure and of estates, taken from Kevin Gray, *Elements of Land Law*. His description of the doctrine of tenure is useful in enabling up to understand why English land law still theoretically rests on the idea that all land "owners" are not owners, but tenants of the crown. His discussion of the services performed by tenants is no longer relevant. It became irrelevant in England with the 1660 *Tenures Abolition Act*, long before English land law was "received" in Canada. The reception of English law happened at different times in the various colonies and territories that made up British North America by 1866, and of course those colonies and territories became provinces or territories of what is now Canada between 1867 and 1949.

Gray takes up the story from here.

It is not easy to imagine, *tabula rasa*, how best to construct a coherent and systematic body of rules governing rights in and over land. During the course of eight centuries, English law has developed a framework of rules which functions today with admirable success, but it is far from obvious that, if the task of construction were begun again, the end result would necessarily resemble the law of real property in its present form. The conceptual points of departure which lie at the back of the law of real property contain little, if anything, of a particularly compelling or *a priori* nature. There is indeed nothing inevitable about the eventual shape of modern land law, but it remains true that the law of today is still heavily impressed with the form of ancient legal and intellectual constructs .... From its earliest origins land law has comprised a highly artificial field of concepts, defined with meticulous precision, with the result that the inter-relation of these concepts is not unlike a form of mathematical calculus. The intellectual constructs of land law move, as Professor Lawson once said, "in a world of pure ideas from which everything physical or material is entirely excluded." The law of land is logical and highly ordered, consisting almost wholly of systematic abstractions which "seem to move among themselves according to the rules of a game which exists for its own purposes." It is from this interplay of naked concepts that the creature of modem land law ultimately derives. English law cannot be properly understood except in the light of its history, and it is in the doctrines relating to tenures and estates that the historical roots of English land law are to be found.

The Doctrine of Tenures The origin of the medieval theory of English land law was the Norman invasion of England in 1066. From this point onwards the King considered himself to be the owner

of all land in England. Since the Normans brought with them no written law of land, they initiated in their newly conquered territory what was effectively a system of landholding in return for the performance of services. According to this feudal theory, all land was owned by the Crown and was granted to subjects of the Crown only upon the continued fulfillment of certain conditions. Land was never granted by way of an actual transfer of ownership, and the notion of absolute ownership other than in the Crown was therefore inconceivable....

It was a direct consequence of this theory that all occupiers of land were at best regarded as "tenants," i.e. as holders of the land who in return for their respective grants rendered services of some specified kind either to the King himself or to some immediate overlord who, in his turn, owed services ultimately to the Crown. In this way there emerged a feudal pyramid, with the King at its apex and it was the doctrine of tenures which defined the terms of the grant on which each tenant enjoyed his occupation of "his" land.

The feudal services rendered by tenants were an integral part of early English land law, and in time became standardized and identifiable by the type of service exacted and performed. The different methods of landholding (differentiated according to the form of service required) were known as "tenures," each tenure indicating the precise terms on which the land was held. The tenures were themselves subdivided into those tenures which were "free" (and therefore formed part of the strict feudal framework) and those tenures which were "unfree" (and appertained to tenants of lowly status who were ... effectively little better than slaves)....

The kinds of service provided by those who enjoyed free tenure included, for instance, the provision of armed horsemen for battle (the tenure of knight's service) or the performance of some personal service such as the bearing of high office at the King's court (the tenure of grand sergeantry). These tenures were known as "tenures in chivalry," and were distinct from the "spiritual tenures" of frankalmoign and divine service (by which ecclesiastical lands were held in return for the performance of some sacred office) and the somewhat humbler tenures in socage, which obliged the tenant to render agricultural service to his lord. With the passage of time, the military and socage tenures were commuted for money payments, but all tenures carried with them "incidents" (or privileges enjoyed by the lord) which were often more valuable than the services themselves.

The consequence of medieval theory was the emergence of a kind of feudal pyramid of free tenants, with the actual occupiers of the land (the tenants in demesne) forming the base, their overlords (mesne lords) standing in the middle - both receiving services and rendering services in their turn - and with the King at the apex receiving services from his immediate tenants (tenants in chief). Pollock and Maitland described the system of tenures in terms of a series of feudal ladders, noting that "theoretically there is no limit to the possible number of rungs, and ... men have enjoyed a large power, not merely of adding new rungs to the bottom of the ladder, but of inserting new rungs in the middle of it." This process of potentially infinite extension of the feudal ladder was known as subinfeudation. However, subinfeudation carried the disadvantage that it tended to make the feudal ladder long and cumbersome, and in time the process of alienating land by substitution became more common. Under the latter device the alienee of land simply assumed the rung on the feudal ladder previously occupied by the alienor, and the creation of a new and inferior rung was no longer necessary.

By the end of the 13th century a more modern concept of land as freely alienable property was beginning to displace the restrictive feudal order, and this evolution culminated in the enactment of *Quia Emptores* in 1290. The *Statute Quia Emptores* constituted a pre-eminent expression of a new preference for freedom of alienability as a principle of public policy. The major innovation contained in the Statute was the prohibition for the future of alienation by subinfeudation. Following the enactment only the Crown could grant new tenures, and the existing network of tenures could only contract with the passage of time. Every conveyance of land henceforth had the effect of substituting the grantee in the tenurial position formerly occupied by his grantor: no new relationship of lord and tenant was created by the transfer. It is the *Statute Quia Emptores* which - quite unnoticed - still regulates every conveyance of land in fee simple today. Every such conveyance is merely a process of substitution of the purchaser in the shoes of the vendor, and the effect of the Statute during the last seven centuries has tended towards a gradual levelling of the Feudal pyramid so that all tenants in fee simple today are presumed (in the absence of contrary evidence) to hold directly of the Crown as 'tenants in chief.

The dismantling of the old feudal order was later accelerated by more direct measures aimed at a reduction of the forms of tenure. Under the *Tenures Abolition Act 1660*, almost all free tenures were converted into free and common socage or freehold tenure. There is therefore only one surviving form of tenure today - freehold tenure in socage - but the conceptual vestiges of the doctrine of tenures live on. It is still true that every parcel of land in England and Wales is held of some lord - almost invariably the Crown. It is still technically the case that no one owns land except the Crown, and that all occupiers of land are merely in the feudal sense tenants. However, for all practical purposes the doctrine of tenures is now obsolete. Tenure of land for an estate in fee simple is now tantamount to absolute ownership of the land - or as close to total control of land as is nowadays possible. The doctrine of tenures has long been overtaken in importance by that other doctrine which explains much of English land law - the doctrine of estates.

The Doctrine of Estates Whereas the doctrine of tenures served within the framework of medieval theory to indicate the conditions on which a grant of land was held, the doctrine of estates defined the effective duration of that grant. The doctrine still plays a fundamental role today in the classification of interests in land law. Since it was intrinsic to the structure of medieval land law that the only owner of land was the King, … it was not initially clear what (if anything at all) the individual tenant could say he owned .... The answer to the conundrum was provided by the doctrine of estates. As Professor F.H. Lawson pointed out, the solution arrived at in English law was "to create an abstract entity called the estate in land and to interpose it between the tenant and the land." The object of the ownership enjoyed by each tenant was not the land itself but a conceptual estate in the land, each estate differing from the others in temporal extent.

Thus by resorting to an ingenious compromise, English law resolved at a stroke the apparent contradiction of theory and reality in the ownership of land. Although at one level the estate in the land merely demarcated the temporal extent of the grant to the tenant, in practice it provided a functional (and theoretically acceptable) substitute form of ownership in respect of land. The doctrine of estates survives to the present day. Like the medieval tenant, the modern proprietor of land owns in some strict sense not the land, but rather an estate in the land which confers specific rights and powers according to the nature of the estate.... Each estate recognised by the common law simply represented a temporal slice of the bundle of rights and powers exercisable in respect of land, and in the doctrine of estates there was developed a coherent set or rules classifying the

diverse ways in which rights in land might be carved up in this dimension of time. It was the concentration on the rights and powers appurtenant to differing kinds of estate which so sharply distinguished the common law view of real property from the continental emphasis on full ownership in the abstract sense (*dominium*). An estate denoted the duration of a grant of land from a superior owner within the vertical power structure which emanated from the Crown; and no man could grant another any greater estate than that which he himself owned (*nemo dat quod non habet,* you cannot give what you do not have.)

The three freehold estates known to the common law were the fee simple, the fee tail and the life estate, and each must now be examined in turn .... The key to the distinctions between them lies in the notion of time. The essence of the doctrine of estates has never been more elegantly captured than in the argument presented before the Court of Exchequer in the 16th century in *Walsingham's Case*. Here it was said that: "the land itself is one thing, and the estate in the land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time".

The estate in fee simple has always been the primary estate in land. It represents the amplest estate which a tenant can have in or over land. As was said in *Walsingham's Case*, "he who has a fee-simple in land has a time in the land without end, or the land for time without end." In so far as real property represents a bundle of rights exercisable with respect to the land, the tenant of an unencumbered estate in fee simple has the largest possible bundle .... Although in theory each tenant in fee simple is still merely a tenant in chief of the Crown, the estate in fee simple is nowadays tantamount to absolute ownership of land. In terms of the feudal fiction, an estate in fee simple denotes a grant of land from the Crown in perpetuity - a right of tenure which endures for ever and which is capable, more or less indefinitely, of transfer *inter vivos* or of devolution on death. The owners of the fee simple estate may come and go but the estate remains, since it is of infinite duration. Each new owner steps into the shoes of his predecessor as a tenant in chief of the Crown - the modern effect of the *Statute Quia Emptores* of 1290.

The owner of an estate in fee simple is sometimes called a freeholder - the owner of a freehold estate. Although modern legislation often curtails the fee simple owner's rights of use and enjoyment (for environmental and planning purposes), there are relatively few limitations on his power to dispose of an estate in the land whether by will or by alienation *inter vivos*.

****

THE LIFE ESTATE

A life estate, as its name implies, is an estate whose duration is measured by the lifetime of a person, or of persons - a definite period of uncertain duration. Life estates are freehold estates. However unlike a fee simple the interest of the tenant of a life estate for his or her own life is not capable of descending to the tenant's heir for the simple reason that there is nothing to descent – the estate wends when the owner dies.

Life estates are of two kinds, distinguished by the identity of the measuring life. In the ordinary life estate, usually called just a life estate but technically known as a life estate *pur sa vie*, the measuring life is that of the tenant of the estate. Thus a conveyance of "to A for life" would be understood as meaning "to A during the period of A's own life".

It is also possible to have the measuring life be that of a person other than the owner of the estate; for example, "to Joan, for the life of Susan". This form of estate is know as a life estate *pur autre vie*. A life estate *pur autre vie* is also created when the holder of a life estate *pur sa vie* conveys his or her interest to another; the new owner of the estate has an estate measured not by his or her own life, but by the life of the original owner. This illustrates a simple but important principle in the law relating to creation of estates in land, one already mentioned: *nemo dat quod non habet*. The original owner here has an estate measured by his or her own life and can only grant that, or something less than that, to another.

It was noted above that a life estate *pur sa vie* is not an estate of inheritance, it cannot descent to the owner's heir because once the life tenant dies there is no interest that can be inherited. But this is not the case with the life estate *pur autre vie*. Consider again the example given above - "to Joan, for the life of Susan". If Susan predeceases Joan, there is no issue of succession to the estate, as Joan's interest has ended. If Joan predeceases Susan there is still unexpired time to be disposed of - the remainder of Susan's life. The common law took the position that all life estates were not estates of inheritance, and so the remaining interest could not descend to her heir on Joan's death. However this common law rule has been changed by statutes. In Ontario today a life estate *pur autre vie* may be disposed of by will: *Succession Law Reform Act*, R.S.O. 1990, c. S-26, s. 2 (a). If the holder fails to dispose of it by will, it will descend to the next-of-kin: *Estates Administration Act*, R.S.O. 1990, c. E-22, s. 2.

NOTE ON THE FEE TAIL ESTATE

This material on the fee tail is for the sole purpose of rounding out your understanding of the basics of the estate system. You do not have to know this, although doing so will enhance your understanding of *Pride and Prejudice* and other eighteenth and nineteenth century novels. When one reads of land being entailed, it is the fee tail to which reference is being made.

A fee tail is a "cut down" fee simple. The "tail" comes from "tailler" - to cut down. It is an estate which descends by inheritance only to a person in the direct line of issue from the original grantee in fee tail. The form of words used to create a fee tail was to add to the words of limitation (words of limitation are discussed below) used to create a fee simple so-called "words of procreation": "to Joan and the heirs of her body". Joan is not free to dispose of the estate by will to whoever she wishes; it may only go to her direct lineal heirs. More importantly, Joan could not sell the fee simple while she was alive because she did not have it. Thus if she conveyed all of her interest to John, and then died without lineal issue, John's interest ended immediately because he only had an estate which lasted as long as Joan had issue. Alternatively, if Joan had issue, her heir could recover the land from John.

Thus in neither case was it an attractive proposition for John to buy Joan's interest, and that, of course, was the whole idea. The fee tail was created through the desire of the aristocracy to ensure that the family estates remained concentrated, and in the direct family. In theory the estate in fee tail could last forever. However, because of the restriction to inheritance only by direct issue of the original grantee, it was possible that it would end eventually for want of eligible heirs. If it did end, the land went to the holder of the reversion. Reversions are discussed below.

Various types of fee tail were developed. The most common, of course, in a patriarchal society, was the Fee Tail Male: "To John and the heirs male of his body". Here only male descendants who could trace their descent from John through an unbroken male line could inherit. It was also possible, though obviously much less likely, to create a Fee Tail Female. Mr Bennett in *Pride and Prejudice* owned a fee tail male, which is why none of his five daughters could inherit.

Other types of fee tail included the Fee Tail General: "To John and the heirs of his body". Here any direct lineal descendant of John was eligible to inherit. There was also a Fee Tail Special, in which only heirs of the body descended from a particular spouse of the grantee could take: "To John and the heirs of his body by his wife Joan." These various versions of the fee tail could be combined: for example, one could have a Fee Tail Male Special: "To John and the heirs male of his body by his wife Joan".

The fee tail may have been viewed favourably by most of the landowning gentry, but it was not liked by everyone. Particular holders of entailed lands found their freedom of action greatly limited, for example. More importantly, the fee tail ran counter to the more general thrust of the common law towards making land freely alienable. Entailed land was not a commodity which could enter the market. Over time the courts responded to commercial pressure by evolving techniques by which the tenant in tail could again alienate the estate, by an *inter vivos* disposition, so as to create in the grantee an estate in fee simple. In effect, the transaction could create in the grantee a greater estate than the grantor possessed. This technique became known as "barring the entail". In 1833 in England (1844 in Upper Canada) legislation was passed permitting the entail to

be barred by a simple deed, if the tenant in tail barring the entail had the estate in possession.

It has not been possible to create a fee tail estate in Ontario since 1956. In that year the *Convevancing and Law of Property Act* was amended to provide that a provision in a deed or will which, prior to May 27, 1956, would have created an estate in fee tail should now be construed as creating an estate in fee simple, or, if the grantor or testator did not own an estate in fee simple, then the greatest estate which the grantor or testator did own in the land.

Although the modern lawyer will seldom be required to research the law on the estate tail, the necessity can arise. Remember that the amendment to the *Conveyancing and Law of Property Act* noted above only prevented the creation of fee tails; it did not abolish existing ones. In addition, one Canadian province, Prince Edward Island, still allows their creation. The issue arose in *Re McKellar* (1972), 28 D.L.R. (3d)162 (Ont. H.C.), where a 1925 will gave the testator's property "to my nephew Archie McKellar .... and if Archie McKellar has any family then ...[the land] becomes his own". Alternative dispositions were provided in the event that Archie McKellar did not have any "family". One proposition advanced at trial was that this should be construed as meaning "to Archie McKellar and his family" and thus as "to Archie McKellar and his heirs" - that is, as a fee tail. In the event the court rejected this interpretation in favour of saying that Archie had been given a life estate combined with a conditional fee simple. The condition was that he have children, and if he met that condition he would receive the fee simple. (Conditional fees are discussed in detail below).

****

PRESUMPTIONS AND WORDS OF LIMITATION

An individual owning a fee simple estate can obviously choose, when divesting him or herself of it, by a will or an *inter vivos* transaction, to simply give the full fee simple estate to someone else. Or he or she could choose to give some lesser estate, such as a life estate, to the other person. And if the words used in the will or *inter vivos* conveyance (grant or deed) are clear as to what is being transferred, there will be no problem in determining what was intended.

But what if the terms of any instrument leave uncertain what was intended? Because of the importance of land in the medieval world the common law required strict adherence to conveyancing formulae if a person wished to transfer *inter vivos* an estate in fee simple. The grant had to say: "to Dan Carter and his heirs." Any other form of words - "to Dan Carter in fee simple, to Dan Carter forever, to Dan Carter and his successors" - would create only a life estate.

In the phrase "to Dan Carter and his heirs" the words to "to Dan Carter" are known technically as words of purchase, words that designate the person to whom the interest is granted. The words "and his heirs" are called words of limitation, words that designate the nature of the interest granted.

The strict common law rule on conveyancing has long been altered by statute. The *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C-34, s. 5 states:

5 (1) In a conveyance, it is not necessary, in the limitation of an estate in fee simple, to use the word "heirs".

(2) For the purpose of such limitation, it is sufficient in a conveyance to use the words "in fee simple" or any other words sufficiently indicating the limitation intended.

(3) Where no words of limitation are used, the conveyance passes all the estate, right, title, interest, claim and demand that the conveying parties have in, to, or on the property conveyed, or expressed or intended so to be, or that they have power to convey in, to, or on the same.

(4) Subsection (3) applies only if and as far as a contrary intention does not appear from the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

The alienation of real estate by will was treated differently at common law. Land was not devisable at all until the passage of the *Statute of Wills,* 1540, and thereafter the courts took a more lenient view of the need for correct words of limitation, a view based on the rule that wills are to be construed in an attempt to find the true intention of the testator or testatrix. A similar provision to the one cited above is now to be found in the *Succession Law Reform Act*, R.S.O. 1990, c. S-26, s. 26, which states:

26. Except where a contrary intention appears by the will, where real property is devised to a person without words of limitation, the devise passes the fee simple or the whole of any other estate or interest that the testator had power to dispose of by will in the real property.

PRESENT AND FUTURE INTERESTS

The preceding pages demonstrate that the estates system recognizes a variety of different interests in land. The next sections will show that the common law also allows for conditional estates, interests in land which may either not arise until the happening of a certain event or which may be terminated in the future by the occurrence of a certain event. Once we know that it is possible to have an interest in land less than the fee simple absolute (life estate, conditional fee simple), the next question is - what happens to the rest of the fee simple, that is, the rest of the time, in any given piece of realty in such a transaction? The answer is that the common law recognizes future interests in land, interests held by persons other than those in possession in the present. It is important to recognize that a future interest is still an interest that a person has in the present. It is a 'future' interest because its holder cannot actually use the land until some time in the future.

Gray's *Elements of Land Law* puts it this way: "Through the doctrine of estates the common law was able to organise the allocation of certain powers of management, enjoyment and disposition over land in respect of particular periods or slices of time. Moreover, as the law of real property became distanced from the physical reality of land and entered a world of almost mathematical abstraction, it was possible to accord an immediate conceptual reality to each slice of time represented by an estate. In other words, any particular slice of entitlement in the land could be viewed as having a present existence, notwithstanding that its owner was not entitled to possession of the land until some future date. In a world of concepts it was quite easy to conceive of rights to successive holdings of the land as present estates coexisting at the same time. It was ultimately this feature of the time-related aspect of the estate in land which made it possible for the common lawyer to comprehend the notional reality of immediate dispositions of, and dealings with, future interests in land."

There are two types of future interests: a reversion and a remainder.

A reversion is any interest retained by the grantor: for example, in the grant "to Kieran Reid for life" the grantor, assuming that he or she holds the fee simple absolute, has not disposed of his or her full interest. The grantor has a reversion in fee simple. A reversion does not need to be specified, it arises by operation of law from the failure by the grantor to alienate the entire interest.

A remainder is an interest created in a third party which follows the granting of an estate less than the fee simple absolute. For example, in the grant "to Beauden Barrett for life, then to Dane Coles", Dane Coles has a remainder in fee simple but no right to possess the land until Beauden Barrett dies. Note that in this example the grantor has no reversion -- he or she has given away the full fee simple.

The above is a very cursory discussion of future interests, but sufficient for the purposes of this course. The area is a lot more complicated and technical than this, but given that this is an introductory course I do not think it necessary or useful to go into all of the details. Ziff's *Principles of Property Law* offers a very good review of the area, as does Philip Girard and Mary Jane Mossman, *Property Law*.

In answering these questions consider both what kind of estate a person has, and whether it is one of present or future possession.

1) Julian Savea has a fee simple estate and executes a deed stating: "I give my land to Brody Retallack". What estate does Brody Retallack have, and why?

2) Beauden Barrett has a fee simple estate and makes a will stating: "to Sam Whitelock for life, and on the expiry of Whitelock's life to Owen Franks for life". What interests do Barrett, Whitelock, and Franks have?

3) Ben Smith has a fee simple estate and makes a will stating: "I give my land to Caleb Clarke for the life of Israel Dagg, then to Sam Cane for life, then to Jerome Kaino."

What interests do Smith, Clarke, Dagg, Cane and Kaino have?

What happens if Clarke dies before Dagg?

4) Who are these people? Did you answer this question without google?

COMMON LAW AND EQUITY: THE TRUST

To all that we have learned above we need to add the concept of a trust. Although Trusts is an upper year course in itself, we need to know the basic idea for this course. The trust is a ubiquitous institution in our law. It is essentially an arrangement in which one person or persons is/are given what is called the "common law" title to property, and another person or persons is/are given the right to benefit from that property. This second person's title is called the "beneficial" title, or "equitable" title (equitable will be explained shortly). The first person has the right, indeed the duty, to manage the property, the second has no powers of management but can insist that the property is used for his or her benefit.

A simple and common example will indicate both how this works and why the trust is useful. Assume that Aaron Smith and his partner Barbara have a small child, Colin. They would want to plan for Colin to be taken care of if, tragically, something happened to them. They do that in part by making Colin their heir. But Colin is seven, does not have capacity at common law to hold property, and in any event is not a great money manager. So they leave their property to Dorothy, Barbara's sister, but when leaving it to Dorothy they also say "in trust for Colin." Dorothy owns the property at common law, and can make decisions in relation to it. For example, if it is a house, she can and indeed must decide if the house should be rented out to provide an income stream or should be sold and the money invested. But Dorothy cannot take any of the benefits for herself, because Colin has the beneficial title. Dorothy, who we call a trustee, she must use the property only for Colin's benefit.

The trust arose as an historical anomaly from the fact that for centuries English law had parallel court systems which in turn administered parallel rules. In addition to the courts of common law, which administered the common law, there was also a Court of Chancery, or Court of Equity, which administered something called "equity." The following extract from the first edition of Ziff, *Principles of Property Law*, provides a brief introduction to the meaning of 'equity' and how it relates to the common law. The first section on "The Origins of Equity" details the historical development of equity, both in the area of doctrine and as a separate institution. The second section on "The Emergence of the Use and the Trust is the more important for our purposes, for it describes, albeit briefly, how the notion of a separate equitable title came into the law. I have edited out the story of how the "use" developed into the modern "trust," it is not important for current purposes. While there were significant differences between uses and trusts, concentrate on understanding the concept common to both - the holding of property by one person at common law for the benefit of another in equity.

The Origins of Equity "Equity" is a ductile term, capable of a variety of connotations. In a broad sense, to do equity is to act fairly or justly. In a more narrow way, one speaks of home owners or investors gaining or holding equity in some property or business enterprise. These meanings relate to the use of the term to represent a cognate set of rules, separate from the common law, which give rise to rights enforceable in a court of equity. This body of jurisprudence emerged from the Crown's residual prerogative over the administration of justice, a power capable or being used as a corrective measure for defects or omissions in the common law. The story of this development is long and intriguing....

The need for remedial institutions for the courts of common law was manifested by complaints of

injustice, levelled by unsuccessful litigants, and directed to the Crown as the fount of all justice. At this formative stage, in the thirteenth century, a variety of approaches were used to respond to the grievances, including: directions to the common law courts to do justice in a given case; references to Parliament (where a general change in the law might be appropriate); and delegation to either the royal council, or to individual councillors, including the Chancellor. The office of the Chancellor served as the royal secretariat, responsible for such matters as the sealing of official documents with the Great Seal of England, and the issuance of writs.... [Over time] the Chancellor emerged as the principal authority charged with the responsibility of assessing the merits of these special pleas.

The early Chancery did not resemble a court.... It was in the latter part of the fourteenth century that the Chancellor increasingly undertook to hear petitions and issue decrees, and by the fifteenth century the Chancery was being regarded as a court of conscience, designed to cure the harshness that could result from unyielding common law doctrine, with its penchant for rigid certainty and technicality. Eventually, the brand of justice dispensed by the Chancery was referred to as equity.

The description of the Chancery as a court of conscience was meant to contrast it with the courts responsible for administering the common law. Until the beginning of the sixteenth century, equity was not a body of fixed substantive rules and precedents. Even as principles began to emerge under the rubric of equity, their application remained a matter of discretion, so much so that in the middle of the seventeenth century John Seldon remarked that the standard of justice varied with each successive Chancellor: "Equity is a roguish thing: for law we have a measure, know what to trust to: equity is according to conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make the standard for the foot, a chancellor's foot; what an uncertain measure would this be? One chancellor has a long foot, the other a short foot, a third an indifferent foot: 'tis the same thing in the chancellor's conscience".

These famous words must have echoed in the ears of future Chancellors, for in 1818 Lord Eldon confided that "[n]othing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this Court varies like the Chancellor's foot." In fact, in the period between these two statements, the nature of equity was changing, solidifying. The practice of appointing ecclesiastics as Chancellors (most of whom had training in canon law) gave way to the selection of lawyers; the last non-legally trained Chancellors in England being the Bishop of Lincoln (who served from 1621-25) and Lord Shaftsbury (1672-73). In truth, even before Seldon's admonition, Chancellors had begun relying on past decisions. In 1727, a treatise on equitable maxims was published, serving to further the process of encoding basic principles....

Equity has always been conceived as a means of perfecting the common law, to improve and supplement, but not supplant it, and the workings of these two discrete regimes were, in theory, harmonious. The thinking was that "equity... does not destroy the law, nor create it, but assist it." However, it was inevitable that some form of political and jurisdictional friction would ensue. Where an order emanating from a common law court was regarded as unjust, it could be stayed by the issuance a common injunction issued by the Chancery. When, in the early seventeenth century, the effect of the common injunction was challenged, unsuccessfully, it was resolved that where a conflict between the common law and equity arose, it was equity that would prevail: that remains so. Therefore, while the starting position was - and remains - that equity purports to follow the law, it was also true that it would not do so slavishly. Otherwise, its curative function would be rather

limited and ineffective.

From the seventeenth to the nineteenth century, the overall complexion of equity changed vastly. It lost its original elasticity, giving way to a more predictable system of governing rules. Equity was still pliable, but so was the common law, which has always developed through analogical extension in the face of new circumstances and disputes of first impression. Despite these growing similarities, these two separate juristic systems stood side by side, a matter that could create difficulties, since rights and remedies available through one court might not be tenable in another. The common law courts applied only common law doctrine (as altered or augmented by statute), and possessed the power to grant a limited set of remedies, the principal one being damages. Equity developed additional remedies, including the injunction and the order of specific performance. Furthermore, differences in the procedures followed in the two court systems created two solitudes among the practising bar: those who appeared in the common law courts and those involved in Chancery litigation. From its genesis as a system of inordinate informality Chancery practice had by this time become so convoluted that attendance there was no simple matter for the uninitiated.

Some reform of the procedures used in the Court of Chancery was undertaken in the 1850s, but it was not until the 1870s that the administration of justice underwent large-scale restructuring in England. The primary development was the fusion of courts of law and equity, so that the two cognate bodies of rules could be adjudicated upon by a single court. Importantly, the conventional view is that these administrative reforms did not directly alter substantive rules. Equitable interests in land remained distinct from those recognized by courts of law…

The adoption of equity into the common law provinces of Canada was straightforward, by and large. However, the process was not a smooth one in some provinces. For example, Upper Canada had no court of equity until 1837, and so, until then, equitable remedies, including those used to enforce trusts, were unavailable. The abuses known to plague the English Chancery produced some apprehension about the introduction of a court of equity to such an extent that an attempt to introduce a court in the 1820s was thwarted. The absence of a court of equity in Nova Scotia was remedied from 1749 to 1825 by the Lieutenant-Governor, as keeper of the Great Seal, sitting as the Chancellor, acting (probably from the 1790s on) with the assistance of members of the Supreme Court of the province. As in England, the Court of Chancery became a publicly vilified and thoroughly unpopular institution, and it was abolished in 1855, with the jurisdiction being transferred to the Supreme Court. This move was influenced by a more modest initiative in New Brunswick of a year earlier. which itself had been inspired by American developments. The Nova Scotia legislation conferred equitable jurisdiction on the Supreme Court.

The Emergence of the "Use" and the "Trust" From a contemporary standpoint the enforcement of the "use", from which later emerged the "trust", stands as the chief contribution of equity to the law of property. To appreciate its nature and significance, the discussion returns to developments in England in the Middle Ages.... The use was a device under which the legal title was granted to one person to hold for the benefit of another. Accordingly, under a grant to uses, land was transferred by A …to B … to be held for the benefit of C… The purpose of such a transfer was to place legal title in B, who was intended to hold it for uses designed to serve C. As will be seen below, such an arrangement was created in circumstances in which it was expedient to separate legal title from the person who was intended to have the real benefit of land, usually because of some disadvantage or disability associated with the holding of the legal title.

The practice of transferring land to uses pre-dated the Chancery's involvement in the process... As far as the common law was concerned, the [beneficiary] had "no more to do with the land than the greatest stranger in the world". Put even more bluntly, the person whom the use was designed to benefit had no rights in a common law court - no entitlement at law to any interest in the land whatsoever....

The Chancellor, by contrast, eventually recognized C's right, and the enforcement of uses became a central function of the Chancery, its orders fixing on the conscience of the [owner at common law] (B) to carry out the purposes for which the use had been created. C, having a right that a court of equity would enforce, came to be thought of as holding an equitable proprietary interest. The Chancellor would not deny that B held legal title. This entitlement was duly acknowledged, and the rights in equity were in fact premised on the existence of the common law title. However, equity regarded the legal interest as managerial only, for it was coated with the obligations imposed in favour of C, and these were treated as paramount.

Modern Functions of the Trust The old functions of the use have been eclipsed over time, but the modern trust possesses its own vitality as a mechanism of private law estate planning and commercial practice. A trust can be set up to allow property to be held for the benefit of minor children, or other dependants. In general, protective trusts can be established, designed to allow a person to enjoy the benefit of trust income, while preventing the beneficiary from having control over the property.... [W]here rights over real property are divided between present and future owners the interposition of the trust can provide one means of regulating the management of the property. Similarly, trusts can be used in a testamentary context to allow for the management of a decedent's estate. A trust is one means through which property can be devoted to charities, for there are the principles of equity (and those added by statute) that create special (generally advantageous) rules for charitable trusts. Within the commercial realm, pension plans, mutual fund investments, debt security, indeed many types of financial ventures, can be undertaken using a trust instrument in some way. The "trading trust" can serve as an alternative form of business organization to the partnership or corporation. And the administration of trusts is itself a field of commercial endeavour. Trusts are sometimes created under statute as a means of effecting public policy. The trust can be deployed as a means of tax planning, that is, it can be used to assist in the ordering of one's (personal or business) affairs in a way that minimizes tax liability....

This overview intimates that trusts are principally advantageous to wealthy organizations or individuals, and that for others they are of marginal or incidental importance. In the main this may be accurate. At the same time it must be understood that trusts may be created in wholly mundane circumstances, involving modest items. Even something as ostensibly worthless as season tickets to see the Calgary Flames play hockey can be the subject of a trust. Moreover, charitable trusts facilitate the redistribution of wealth through eleemosynary donations, and as such, these are concerned with more than just elite practices.

NOTE: The statement in the last paragraph that season tickets to see the Calgary Flames are 'ostensibly worthless' is not a statement of law. Professor Bruce Ziff teaches at the University of Alberta, in Edmonton. This is why he uses the Calgary Flames as exemplary of what is worthless. In any other province the example would have been the Toronto Maple Leafs, proud winners of the 1967 Stanley Cup.

INTRODUCTION TO CONDITIONAL ESTATES

We have seen that estates in land are temporal slices of the rights to the possession, use and enjoyment thereof. So far we have considered these estates as "absolute", as belonging unconditionally to someone. Estates may, however, be granted subject to conditions. Conditions can be attached to both common law interests in property and to equitable interests. Conditions can be of two kinds.

Conditions Precedent. First, there can be conditions of eligibility, or what are known technically as conditions precedent. These must be satisfied before the grantee has any right of enjoyment at all. For example: 'to Alan at 21', or 'to Betty for life if she should marry Jane'. Until Alan turns 21, or until Betty marries Jane, they have only what are called *contingent* interests. If either dies before the condition is met, or if the condition becomes impossible of performance (for example, if Jane dies before Betty marries her) the interest will be extinguished and there is nothing that can pass to heirs. Conversely, if Alan becomes 21, or if Betty marries Jane, then the condition is satisfied and the interest becomes a *vested* interest.

This does not mean that the owner of a vested interest has an immediate right to possession. That is the case in the two examples given above, but it is not so in the grant "to Alan for life, then to Betty for life if she reaches 21". At the time of the grant, assuming Betty is not 21, her interest is contingent. If she reaches 21 while Alan is still alive, her estate becomes *vested in interest*, but she has no right to physical possession and use until Alan dies.

It should be noted here that the common law generally favours early vesting where there is any doubt about whether a grantor or testator/testatrix intended to create a vested or contingent interest. *Mackay* v. *Nagle et al* (1988), 30 E.T.R. 191 (N.B.Q.B.) illustrates this point. The testator left his property to his wife for life "and thereafter to my living children in equal shares". His four children were alive when the will took effect, but one died during his widow's lifetime. Did the word "living" mean children alive at the time the will took effect, in which case the now-deceased child's interest would be vested and would descend to his heirs? Or did it mean living at the time the widow's life estate expired, in which case it would be a contingent interest, the condition precedent being surviving the widow? In coming to the conclusion that the interest was vested, the court considered extrinsic evidence of the testator's intention when the will was made. But it relied largely on a series of cases establishing the principle that, in ambiguous cases, "the courts generally follow a rule of construction favouring early vesting".

Conditions Subsequent. The second kind of condition, the one that will principally concern us here, is a condition of defeasance, known as a condition subsequent. These operate to defeat an estate which has already been granted or willed to a person.

For example: 'to Charles in fee simple, but if he ever becomes a member of the Law Society of Ontario, to Dorothy in fee simple'. If Charles acquired the land in 2019 with this condition attached, he had the estate but he was liable to lose it at a future date if he became a lawyer licensed to practice in Ontario.

These conditions of defeasance are personal if they relate to the person. In the above example if

Charles died in possession and never having joined the legal profession, his or her heirs will inherit a fee simple absolute. But they are not personal, will go with the land, if the condition relates to use of the land itself.

While I have used the term "fee simple" here, any estate can be made subject to conditions.

There are two kinds of conditions subsequent, which are conceptually distinct and which have different consequences if the condition is breached or found invalid. This is an area of excessive technicality which, as with future interests generally, I choose to skip over. More about it can be found in Ziff, *Principles of Property Law*, pp. 242-245. For current purposes you need only to know the distinction between a condition precedent and a condition subsequent.

****

CONDITIONS AND PUBLIC POLICY: INTRODUCTION

The next three cases deal with the meaning of "contrary to public policy." This is a difficult notion to define. It includes conditions contrary to law - which means both conditions mandating an illegal act and conditions which seek to subvert the course of law. An example of the latter is a condition providing for divestment if the grantee becomes a bankrupt. The bankruptcy law of the jurisdiction, not the grantor, provides for the disposition of property on bankruptcy: see *Re Machu* (1882), 21 Ch. D. 838. A clause in a will disinheriting a beneficiary if he or she challenges the will has also been held to be against public policy.

Beyond this category, it is difficult to find a neutral principle say why the content of certain kinds of conditions have attracted judicial disapprobation as contrary to "public policy" and others have not. This is an area in which the small "p" political values of English and Canadian judges have determined the categories that fall under "contrary to public policy" and in which the idea that private property should remain private has been, and continues to be, highly influential. Looking at the older cases most conditions which have historically been held to be contrary to public policy were considered so because they represented they threatened what were seen as the bedrock of societal institutions – marriage and the family and the subordinate position of women. Hence restraints on marriage, conditions encouraging divorce or separation, and conditions affecting parental duties were considered contrary to public policy. Also so considered were restraints on alienation, conditions which limited the property owner's freedom to do what he or she wanted to do with property. We will not discuss these categories any further.

The issue of concern here is the relationship between private property, public policy, and what we now call unacceptable discrimination. As you will have gathered from *Clayton* v. *Ramsden*, "discrimination" has not traditionally been a reason for voiding conditions as contrary to public policy. The ethnic and religious distinctions made in the will in that case attracted little comment. There is a hint of disapproval in both judgments, aimed mainly at the idea of restricting a person's choice of marriage partner but the provision in the will was not invalidated on that basis or on the ground that it was wrong to restrict that choice by reference to a person's religion.

In similar vein, in *Re Hurshman*_(1956), 6 D.L.R. (2d) 615 (B.C.S.C.) the testator left property which his daughter would inherit "provided she is not at that time [the time when the will took effect] the wife of a Jew". This will was made a month after Mr. Hurshman's daughter married Ivan Mindlin, who all parties to the case agreed was by "lay definition" Jewish. McInnes J. held that the condition "is directly contrary to public policy" because "in order for the daughter to inherit she must divest herself of her husband". This is a very rare case in which a religion-related condition was struck for being contrary to public policy, but note that it was not the religious aspect that was held to be bad but the fact that the condition encouraged marital breakdown.

The next three cases all directly tackle the question of whether it is acceptable to impose discriminatory terms in property dispositions and transactions, or, in the *Spence* case, whether a court will intervene with a disposition which was facially motivated by dislike of somebody's ethnicity. The first case, *Re Noble and Wolf,* is not about a condition attached to land but about a term in a restrictive covenant. We will cover restrictive covenants in a later chapter. But it is an appropriate case to read at this point because it involves what the Ontario Court of Appeal saw in 1949 to be the line between private choice and public policy and what it also saw, especially Hogg

CHAPTER FIVE

CO – OWNERSHIP IN THE COMMON LAW

INTRODUCTION: TWO FORMS OF CO-OWNERSHIP

We have seen that the common law permits "shared" ownership where ownership is divided by time - for example, the life tenancy and the reversion in fee simple. It also permits two or more persons to own property and to have simultaneous rights in it. When this happens they are said to hold jointly, to be co-owners, or to have concurrent interests in the property. Any estate known to the law, and all types of property, can be the subject of co-ownership.

The term co-ownership here does not refer to that increasingly ubiquitous modern form of urban living, the condominium, or land subject to "strata title." There is a note on condominiums later in the chapter. Rather, we are talking about one interest in property being owned by two or more people.

The common law has long permitted co-ownership, and to complicate matters there is more than one form of co-ownership. Historically there were four, but only two now concern us. Cheshire, *Modern Law of Real Property*, gives the following explanation:

There are four possible forms of co-ownership, one of which, tenancy by entireties, is now defunct; while another, coparcenary, seldom arises. The two found in practice are joint tenancy and tenancy in common.... The two essential attributes of joint tenancy which must be kept in mind ... are the absolute unity which exists between joint tenants, and the right of survivorship.

There is, to use the language of Blackstone, a thorough and intimate union between joint tenants. Together they form one person. This unity is fourfold, consisting of unity of title, time, interest and possession. All the titles are derived from the same grant and become vested at the same time; all the interests are identical in size; and there is unity of possession, since each tenant *totum tenet et nihil tenet*. Each holds the whole in the sense that in conjunction with his co-tenants he is entitled to present possession and enjoyment of the whole; yet he holds nothing in the sense that he is not entitled to the exclusive possession of any individual part of the whole. Unity of possession is a feature of all forms of co-ownership. For this reason one joint tenant cannot, as a general rule, maintain an action of trespass against the other or others, but can do so only if the act complained of amounts either to an actual ouster, or to a destruction of the subject matter of the tenancy.

The other characteristic that distinguishes a joint tenancy is the right of survivorship, or *jus accrescendi*, by which, if one joint tenant dies without having obtained a separate share in his lifetime, his interest is extinguished and accrues to the surviving tenants whose interests are correspondingly enlarged. For example, A and B may be joint tenants in fee simple, but the result of the death of B is that his interest totally disappears and A becomes owner in severalty of the land. There are cases, however, where the right of survivorship does not benefit both tenants equally, for if there is (say) a grant to A and B during the life of A, and A dies first, there is nothing that can accrue to B.

There is a fundamental distinction between tenancy in common and joint tenancy. In the first place, that intimate union which exists between joint tenants does not necessarily exist in a tenancy in common. In the latter case the one point in which the tenants are united is the right to possession. They all occupy promiscuously, and if there are two tenants in common, A and B, A has an equal right with B to the possession of the whole land. But their union may stop at that point, for they may each hold different interests, as where one has a fee simple, the other a life interest; and they may each hold under different titles, as for instance where one has bought and the other has succeeded to his share. Each has a share in the ordinary meaning of that word. His share is undivided in the sense that its boundary is not yet demarcated, but nevertheless his right to a definite share exists.

The second characteristic, and it is really the complement of the first, is that the *jus accrescendi* has no application to tenancies in common, so that, when one tenant dies, his share passes to his personal representatives, and not to the surviving tenant: "A tenancy in common, though it is an ownership only of an undivided share, is, for all practical purposes, a sole and several tenancy or ownership; and each tenant in common stands, towards his own undivided share, in the same relation that, if he were sole owner of the whole, he would bear towards the whole."

****

DISTINGUISING A JOINT TENANCY FROM A TENANCY IN COMMON AT THE TIME OF CREATION

Given the consequences of the distinction between joint tenancy and tenancy in common - the right of survivorship - it is obviously important that we know in each case which of the two co-ownership regimes has been created by a disposition to two or more persons. Given that a joint tenancy requires the four unities, we can say that they are a necessary condition for a joint tenancy, and that if they are not present then the co-owners are tenants-in-common. But the four unities are not a sufficient condition for a joint tenancy - there must also be the intention to create one. Thus if a will states that land is given "to John and Jenny as joint tenants in fee simple" then John and Jenny hold as joint tenants. The four unities are present and the testator or testatrix has clearly indicated a desire to establish a joint tenancy.

But it is not always so simple. Remove the words "as joint tenants" from the above provision and, while the four unities are still present and while the testator or testatrix clearly wishes John and Jenny to be co-owners, we cannot say from the words alone whether that co-ownership is as joint tenants or as tenants in common. What is therefore needed are presumptions to deal with unclear cases, similar to the presumptions discussed in chapter four when transfer documents leave it unclear whether a life estate or a fee simple was intended.

Unfortunately, courts of common law and courts of equity operated with different presumptions, and statutory reform has partially amended the common law rules. Although we no longer have separate courts of equity, in some areas of the law, including property, we still use the distinctions between common law and equitable rules which emerged through the operation of separate courts of common law and equity.

Common Law, Equitable, and Statutory Rules

1) At common law, provided the four unities were present, grants and testamentary dispositions of all property, real and personal, made to co-owners, were presumed to be joint tenancies if the words of the transfer were equivocal. Thus a simple phrase like "to John and Jenny" created a joint tenancy. The common law took this position because survivorship lessened the number of names on the title and thereby made conveyancing easier. This presumption is the old, common-law rule, no longer applicable (see below, Number 3 on this page).

2) Equity preferred the opposite presumption to the common law. That is, it preferred tenancies in common to joint tenancies because they were fairer and did not contemplate an owner, or rather an owner's heirs, losing all rights through survivorship. However, the general principle that "equity follows the law" meant that equity could not presume a tenancy in common in all circumstances, for that would have meant that equity would have "overwhelmed" the common law. It therefore accepted the common law presumption where the joint tenancy was clearly stated or where the joint tenancy was not clearly stated and the presumption in favour of joint tenancy kicked in.

However, courts of equity would try to find "words of severance" in a grant or will when it could. As it is put in Cheshire, *Modern Law of Real Property*, equity found a tenancy in common if there were "words of severance showing an intention ... that the donees are to take separate shares." Such words might be "to John and Jenny equally". "Equally" is an equivocal term, and equity said that it denoted two separate but equal interests, not an "intimate union."

In addition, in some circumstances equity refused to follow the law and presumed a tenancy in common in equity even if the four unities were present and the intention to create a joint tenancy was clear. There were three circumstances where, per Cheshire again, "equity reads what is at law a joint tenancy as a tenancy in common". They were:

(a) where money is advanced on a mortgage, whether in equal or unequal shares;
(b) where the purchase price is provided in unequal shares; and
(c) where the property belongs to a business partnership.

More recently another category has been added - if possession of jointly-owned property is shared by individuals pursuing separate commercial interests equity will presume a tenancy in common.

When equity decided that a disposition created a tenancy-in-common, that meant that the common law title was a joint tenancy, and the equitable title was a tenancy-in-common.

3) The rules enunciated above remain the common law and equitable approaches to personal property. However, statutory reform has long altered the rules for real property. It is now presumed that a tenancy in common has been created unless the instrument clearly states otherwise. Section 13 of the *Conveyancing and Law of Property Act,* R.S.O. 1990, c. C-34, states:

13 (1) Where ... land has been or is granted, conveyed or devised to two or more persons, other than executors or trustees, in fee simple or for any less estate, it shall be considered that such persons took or take as tenants in common and not as joint tenants, unless an intention sufficiently appears on the face of the letters patent, assurance or will, that they are to take as joint tenants.

(2) This section applies notwithstanding that one of such persons is the spouse of another of them.

To create a joint tenancy in land you now need to be very clear about it. The usual formula is to say "to John and Jenny as joint tenants and not as tenants in common." Obviously if this is done, if an "intention to the contrary" is clearly indicated, the joint tenancy must stand.

Putting all these rules together, we can conclude that:

1) If John and Jenny acquire real property as co-owners, they do so as tenants in common, unless there are clear words to the contrary.

2) If John and Jenny acquire personal property, the common law presumes that the legal title is held as a joint tenancy, unless it is clearly stated otherwise. But if, for example, the property is then used by John and Jenny in a business partnership, equity presumes that the equitable title is held as a tenancy in common. In this situation the personal property would be held by them as legal (a term used to mean common law as opposed to equitable) joint tenants and as trustees for each other as equitable tenants in common. We will see the operation of the equitable preference for tenancies in common again, in the section below on severance of joint tenancies.

Note two other statutory provisions. Section 14 of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C-34, provides: "Where two or more persons acquire land by length of possession, they shall be considered to hold as tenants in common and not as joint tenants."

Section 55 of the *Succession Law Reform Act,* R.S.O. 1990, c. S-26, provides: "(1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the property of each person, or any property of which he or she is competent to dispose, shall be disposed of as if he or she had survived the other or others." (2) Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person shall be deemed, for the purposes of subsection (1), to have held as tenant in common with the other or with each of the others in that property.

SEVERANCE OF JOINT TENANCIES AT A LATER DATE

Severance is the process by which a joint tenancy is converted into a tenancy in common. That is, assume that the co-ownership was a joint tenancy when created. But something happens later to convert the joint tenancy into a tenancy in common. The parties remain co-owners and there is no physical division of the property - that is partition, discussed later in this chapter. The principal significance of severance, therefore, is that it brings to an end the right of survivorship.

Severance of the common law title can be achieved by any act by any joint owner on his or her legal title so as to destroy one of the four unities, the *indicia* of a joint tenancy. Thus if John and Jenny are joint tenants of a piece of land, and John sells his interest to Camilla, Camilla and Jenny are still co-owners (John having sold a co-owned interest), but they are tenants in common because they hold their interests under different titles - the unity of title has been broken. In Ontario and some other provinces such legal acts include sale to oneself by a joint tenant, which is permitted by s. 41 of the *Conveyancing and Law of Property Act,* R.S.O. 1990, c. C-34: "A person may convey property to or vest property in the person in like manner as the person could have conveyed the property to or vested the property in another person." However, the common law did not permit a sale to oneself to sever, and in Nova Scotia, for example, where there is no statute like the Ontario one, it still does not sever: see *Penny* v. *de Long Estate* [2013] NSCA 74.

Since equity prefers tenancies in common in any event, there are no circumstances in which equity would insist on retaining a joint tenancy in equity if it was severed in common law by an act such as the ones already described.

But merely because no such legal act has served to sever the common law title does not mean that equity would not strive to find the equitable title severed. The principles on when this would occur were laid out in the nineteenth century case of *Williams* v. *Hensman*, discussed in *Burgess* v. *Rawnsley* below. The second and third ways to sever noted there sever in equity but not in common law. *Burgess* v. *Rawnsley* is the leading modern English case on the application of *Williams* v. *Hensman*. When reading it note that statutory reform in England has abolished the common law tenancy in common, so that conveyances to two or more people must be done through a common law joint tenancy, with the only issue being whether the equitable title is held as a joint tenancy or as a tenancy in common. The reason for this is that it makes it much easier to search title. Thus the conveyance to Honick and Rawnsley quoted below states: 'the Purchasers shall hold the said property ... upon trust for themselves as joint tenants.' Of the Canadian jurisdictions, only Manitoba has enacted a similar reform, and then only partially.

Burgess v. *Rawnsley* is a classic severance case, in that it involves a dispute between the survivor of two joint tenants, who argues that the joint tenancy was not severed and that therefore he or she gets all the property by right of survivorship, and the heir of the deceased joint tenant, who argues that the joint tenancy was severed, and that he or she gets to inherit the deceased's interest.

The two cases following *Burgess* are Ontario cases, including the most recent word on the subject of what constitutes a 'course of dealings' from the Ontario Court of Appeal.

RELATIONS BETWEEN/AMONG CO-OWNERS: INTRODUCTION

The material in this section, and in the subsequent one on partition or sale, applies equally to joint tenants and to tenants in common.

The underlying principle in the law's treatment of the relations between co-owners is that the owners should work out their problems themselves; the courts will not "police" the relationship. At common law there were only two actions that could be taken by one co-owner against another.

First, an action for "waste" was available if one co-owner damaged the land. An action for waste is available whenever two or more persons have an interest in land, whether the two parties and life estate holder and owner of the reversion or remainder, or landlord and tenant, or co-owners. The courts were restrictive in allowing actions for waste between co-owners because co-owners have equal rights of occupation and use. Injunctions against waste will be granted only where the waste is malicious, or destructive, or attended by peculiar circumstances; there is no action for waste if the land use is reasonable.

Second, if one co-owner seeks to exclude the other from the land, the action of ouster is available. This responds to the rule that no co-owner can exclude the others from possession or enjoyment of the whole or part of the land. However, mere sole possession or appropriation of the entire proceeds does not amount to an ouster, which requires denial of the co-owner's rights.

An interesting case on ouster is *M.* v. *H.* (1994), 17 O.R. (3d) 118 (G.D.). The parties were same-sex partners who registered their cottage as a joint tenancy. When they split up one sued for support, arguing that the provision of the *Family Law Act* which restricted the meaning of spouse to persons of the opposite sex violated the *Charter of Rights.* In interim proceedings a small side issue was use of the cottage property they owned together, the mortgage and other expenses of which were paid for by one party. The other had had no access to it since the separation, and asked for an order permitting her use and occupation. The defendant argued that as she was paying all the expenses, such an order would be "tantamount to" support. Epstein J rejected this argument. The only way one party could achieve exclusive possession was via the provisions of the *Family Law Act*, and to that point the *Act* was inapplicable. Thus the couple's interests were to be decided according to the common law, and the party in possession, in refusing to let her partner use the cottage, had "ousted" the other. The court ordered use on alternate weekends.

An action for account, an action where one party claims that another must pay him or her money, was not available at common law, but could historically be obtained in equity. It is now available by statute, but in very limited circumstances, as explained in the following case.

A NOTE ON CONDOMINIUMS

As noted at the beginning of this chapter, common law co-ownership is not the same as a condominium. The advantages of condominiums are obvious, for they allow people to own property where land is at a premium and expensive, by both extensively using the space above ground and by having owners combine to share common expenses.

Today's condominiums are created under the auspices of enabling legislation. In Ontario the first *Condominium Act* was passed in 1967 (S.O. 1967, c. 12) and its full title is delightfully descriptive: "An Act to facilitate the Division of Properties into parts that are to be owned Individually and parts that are to be owned in Common, and to provide for the Use and Management of such Properties." The Ontario *Act* was extensively revised in 1998 (S.O. 1998, c. 19).

It was theoretically possible to create a condominium at common law, but there were many practical difficulties in doing so, hence the use of the word "facilitate" in the statute's title. The statute did not "invent" the idea, it made it much easier to achieve. As Ziff notes (*Principles of Property Law*, 4th edition, pp. 338-340), common law condominiums created two kinds of problems. One set of difficulties concerned what it was one owned. The common law does allow for ownership of rights in the air, without any kind of surface attachment, although for some time the matter was in doubt. But often statutory land registration rules did not permit the registration of such an interest, and when they did it was very hard to describe the boundaries, since boundary descriptions/surveys refer to fixed points on the ground. If an interest could not be properly registered it was hard to get a mortgage. There was also a problem at common law in that if a building was destroyed the "condo" owner was left with nothing - or rather he or she was left with owning space in the air. This could be solved by having all owners own the surface in common.

Because of the title registration difficulties one of the things that condominium legislation does is to state that interests in a condominium can be registered, and it usually mandates the creation of a distinct register for them. Usually it is required that a declaration and description of the building be registered, including a statement of how much is common and who has the individual units.

The second kind of problem with common law condos was management. One could make all the individual owners tenants in common of the common spaces and have them contract among themselves to share common expenses and obligations and to agree to common restrictions on the uses of individual units. But in practice this was very hard to organise and it was impossible to prevent people selling their interests if they wished to, including their share of what were functionally "common areas." It was also difficult to impose common obligations because, as we shall see when we look at covenants affecting land, positive obligations are not generally enforceable against successors-in-title - people who buy units from the original owners - because of a lack of contractual privity. Other problems included joint and several liability for property taxes - a default meant that each owner was liable for the whole. Also, at common law everybody would have to agree to changes in the original contract. If co-owners cannot get on, the rather extreme remedies of partition or sale are the only ones available.

The legislation changes all this. A condominium cannot be registered unless there is a condominium corporation (a non-share capital corporation) which owns the common areas with all the unit holders members of the corporation. There is an elaborate mechanism for governance by a board of directors which enacts by-laws and there is provision for making some decisions by majority vote of all the members. In Ontario a condominium must have what is called a "declaration", which is a kind of constitution, and things covered in the declaration (for example the relative contributions of individuals to common expenses) cannot be changed except by a substantial majority of the members. Ziff suggests that condominium legislation "creates a micro-sovereignty that can enact and enforce a type of local law": *Principles of Property Law*, fourth edition, p. 339.

Prior to the enactment of condominium legislation, and still used, co-operatives were and are another way to achieve something like a condominium. But in a co-operative a corporation owns the whole building and individual members occupy apartments pursuant to occupancy agreements. It therefore lacks the element of home ownership which condominiums provide.

Condominiums and co-operatives are not the only forms of communal or co-ownership that exist in Canada. As we discussed in chapter 2, matrimonial property legislation in common law provinces establishes what might be termed deferred co-ownership. Individual ownership exists during a marriage, but when that marriage ends there is a presumption of equal sharing of the matrimonial assets. In Quebec the civil law system of a community of property operates differently, giving spouses equal rights of ownership during the marriage. Religious colonies such as the Hutterites have the land owned by the congregation, and if a member leaves he or she has no right to take a proportionate share. And as we shall see in a later chapter, land held pursuant to aboriginal title is held communally by the aboriginal society.

CHAPTER SIX

SERVITUDES PART 1 - EASEMENTS

INTRODUCTION

An easement is one of the class of rights in land known as "incorporeal hereditaments", or sometimes as "servitudes". It is a "use" right - the right of one landowner to go onto the land of another and make some limited use of it. It is not a "natural right", it does not come with the fee simple, and must therefore be created as part of the relationship between the two landowners. There are many types of easements, in the sense that there are many different kinds of things which can be the subject of an easement. There is also more than one way to create an easement. Perhaps the most common kind of easement is the right of way created by express agreement of the parties, and I will use that paradigmatic situation as an illustration.

Imagine that Angela owns land bordered on three sides by woods, and on one side by a road. Angela wishes to sell part of the land, and Betty wishes to buy part of it. But Angela wants to sell a part that does not border on the road. Betty is not going to buy if getting to the grocery store entails, at best, hacking a path through the woods, assuming that Betty has Angela's permission to go through the woods. If not, a helicopter will be required. The solution is simple. As part of the agreement by which she buys the land from Angela, Betty also obtains the right to cross Angela's land to get to the road. Perhaps Angela will extract some price for this, some increase in Betty's purchase price, but it matters not to the law whether payment is given, only that the agreement has been made.

Even though the agreement for the right of way was made between Angela and Betty as people, they were in fact contracting as owners of each parcel of land, and their agreement binds the land. This is the case provided:

First, the easement has been created by one of the methods acceptable to the law (an issue dealt with later in this chapter), and

Second, if the right granted meets the necessary test as being the kind of thing allowed by the law of easements (an issue discussed immediately below).

If both these requirements are met, then the easement will generally run with the land, be a part of title. That is, if the easement is created during the period that Angela and Betty own the two pieces of land, and Angela then sells to Christopher and Betty sells to Don, Christopher and Don are in the same position as landowners as Angela and Betty were. This is what makes the easement a property right, for the original agreement between Angela and Betty could be enforced merely as a contract, as could any other agreement between them. But if the particular right created by the initial contract is an easement, it becomes part of the title, part of the estate that each successor owner has, it has an existence independent of the identity of the owner of the land at any given time.

Easements are thus a relationship between two parcels of land – and the parcels are called the dominant tenement and the servient tenement. In this example the land that is reached by crossing the other parcel is the dominant tenement; the land that is crossed is the servient tenement, it serves the dominant tenement.

****

ESSENTIAL REQUIREMENTS OF EASEMENTS

The first issue we will look at is that of what kinds of rights the law will consider to constitute valid easements. The common law will not simply consider any agreement between two landowners to have created an easement. To qualify, the right granted must meet the four fold test laid out in Ellenborough Park below. In that case there was no question that an agreement was made between vendors and purchasers in 1855; but only if that agreement created a right in the nature of an easement can it still be enforced 100 years later. The four principal requirements are laid out below, and you should make sure that you understand what each means and how the court assesses them in light of the facts of the case.

The four requirements are somewhat technical, but like many technical rules they have a socio-economic purpose. You should also think about what the purpose of these four requirements is, bearing in mind two points. First, as Evershed MR explains, while easements had been part of the common law for centuries, until the nineteenth century the vast majority of easements were rights of way over another's land. This was inevitable in a largely rural England. With the advent of the industrial revolution, and the urbanization that went with it, many more types of easements came into being. When people came to live together in close proximity, and in close proximity also to industrial establishments, they needed more than access to land, they needed sewers and drains, pipes to carry water and gas, lines strung from poles to convey electricity and telephone lines, etc. The growth in the number and variety of easements was thus a legal response to the great social and economic changes that occurred in the nineteenth century.

Second, having said this, easements also create some burden on the servient land. If somebody has the right to run a pipe under your land, you cannot choose to do anything you want with your land if it involves digging up or damaging that pipe. All burdens on land have some effect, even if it is often a small effect, on alienability. Maximum alienability, as we saw in chapter 4, was a central goal of changes in land law from the seventeenth century on. Thus, speaking in broad strokes, the rise of easements in the nineteenth century created a tension between the utility they provided and the reduction in alienability they brought as a consequence. As you think about the four "characteristics" of easements it is useful to think about how each one seeks to limit burdens on titles to land. Some limit burdens by ensuring that the numbers of easements are limited, others by ensuring that the types of easements are similarly restricted.

A FIFTH REQUIREMENT? AN EASEMENT MUST NOT BE NEGATIVE

A great number of rights have been recognised by the courts as valid easements. A selection includes the right to tunnel under land, to maintain power lines and towers, to discharge water onto somebody else's land, to have drainage pipes and sewers underground, to string a clothes line, to use a church pew, and, my personal favourite, to use a neighbour's washroom. The list of possible easements is by no means closed, despite some judicial pronouncements hinting at that in the early part of this century, a point established in Re Ellenborough Park.

However, it should be noted that the numerous examples given here are all of what are termed "positive easements". That is, they involve A's right to do something on B's land. But there are also a few "negative" easements recognised. They are called negative because although they still are conceptualised as giving one person the right to use another's land for a certain purpose, their principal effect is to prevent the owner of the servient tenement doing something with his or her land. land. Those accepted long ago are: a right to light; a right to receive air by a defined channel; a right to lateral support for buildings; and a right to continue to receive the flow of water from an artificial stream.

A right to light, important in pre-electrification days, illustrates the point that the principal physical effect of a negative easement is to prevent the owner of the servient tenement doing something with his or her land. Imagine two adjoining lots of land, one vacant and the other with a factory four stories high on it. The owner of the land on which the factory stands needs good daylight to operate. Conceptually the right to receive light across the neighbour's land is an easement – it is the factory land, the dominant tenement, using the vacant land, the servient tenement, as an avenue for the light to reach his or her land. But practically it has a very substantial effect on the vacant land, because it is effectively a building restriction.

Note that the support right mentioned above - a right to lateral support for buildings - is a right not included in the list of "natural rights" which come with the fee simple. Included within the category of "natural rights" are the right to subjacent support for land and buildings, and the right to lateral support of land. Thus while some support rights are "natural", others must be "acquired" by obtaining an easement.

Phipps v. Pears involves a claim for a negative easement an easement of protection from the weather. Do not concern yourself at this stage with how any easement might have been created. Consider the arguments for and against permitting this and other negative easements. What values animate the judiciary in this instance?

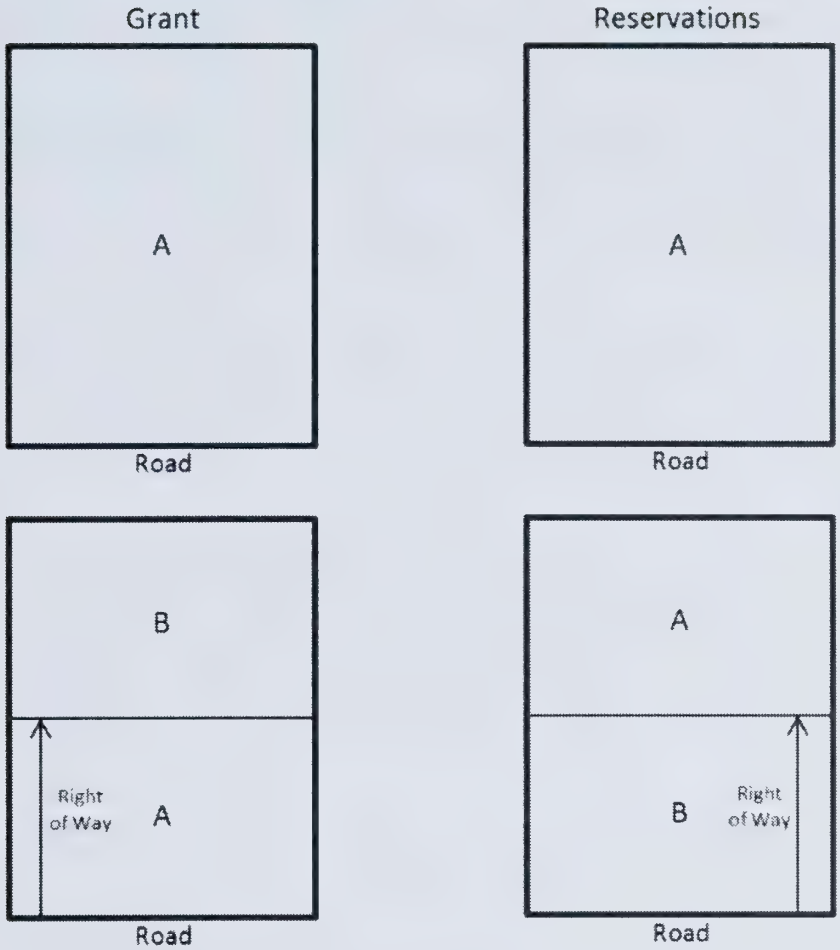
CREATION BY EXPRESS GRANT - GRANTS AND RESERVATIONS

The common law maintains that all easements "lie in grant"; that is, they must be created by one person with an interest in land granting the right to another. (This will usually involve fee simple owners but it need not do so). The grant of the easement may be separate from the grant of an estate or joined with it. Obviously there was a grant in the *Ellenborough Park* case, the original owner of the land granting to each purchaser of a house the right to use the pleasure grounds. A transaction such as this, at the time of sale, is called an express grant of an easement.

At this stage we need to introduce the distinction between grants and reservations - see diagram on next page. Consider again the example used in the introductory note to this chapter of a person's wish to sell off part of a piece of land surrounded on three sides by woods and on one side by a road. The land will be divided into two with one part "landlocked". If the seller parts with the landlocked part and gives the buyer an easement, he or she grants both an estate and an easement. This is called an express grant of an easement. However, if the seller wants to keep the landlocked part and to sell off the part that fronts the road, and in doing so makes an agreement that he or she can have access to the road over the buyer's land, he or she has reserved the easement in the grant. The seller has kept something back. This is called an express reservation of an easement, although note that it is still being created in a grant. See the diagram on the following page.

If you think that the word "grant" is being used here both as a verb (the process of giving) and as a noun (the transaction) you are correct. This is potentially confusing though it need not be; one can either expressly grant an easement in a grant or expressly reserve the easement in a grant.

Express grants and reservations are easy to understand, and we will do no more on them. It should be noted, however, that as it involves an interest in land the grant of an easement (by grant or reservation) must conform to the rules of the jurisdiction regarding the transfer of interests in land. Essentially that means that the transaction must be “evidenced by writing.”


Grant
A
Road
Reservations
A
Road
B
Right
of Way
A
Road
A
B
Right
of Way
Road

****

CREATION BY IMPLIED GRANT: GRANTS AND RESERVATIONS

It was stated above that "all easements lie in grant" at common law. In reality this is a fiction, for the law permits the creation of implied grants of easements and of prescriptive (created by long use) easements. Prescriptive easements are established by long use, and are rare nowadays, thus for lack of time we will not deal with them in this course. The fiction that all easements lie in grant is maintained by calling these easements obtained by presumed grant.

Implied grants and reservations represent situations in which the law implies into a land transaction which is silent on the subject an agreement to also create an easement. As with express grants, the rules are different as between implied grants and implied reservations. Mendes da Costa and Balfour, Property Law: Cases, Texts and Materials, does a good job of laying out the general principles:

The situation in which easements are most commonly created by implication occurs when there is a severance of a possessory interest in land into two or more interests. This can happen, for example, when the owner of two lots sells one of them, when a homeowner leases one floor of his house to a tenant, or when a testator provides by will for the division of his real property for two or more devisees. In such cases, easements appurtenant to any of the several parts of the land may of course be created expressly. But if they are not, when do easements arise by implication?...

The leading case on many aspects of the question, regularly quoted and followed by English and Canadian courts, is Wheeldon v. Burrows (1879) 12 Ch.D. 31 (CA); it is the best introduction to the modern law. In Wheeldon, Tetley owned a piece of vacant land and an adjoining industrial property on which had been built a factory and several workshops. In January 1876, he conveyed one lot of the vacant land to the plaintiff's husband and shortly thereafter sold the industrial land to the defendant. Although the deed to the plaintiff's husband had not expressly reserved any right over the land for the benefit of Tetley's other property, the defendant claimed, as Tetley's successor, an implied easement of light which prevented the plaintiff (who succeeded to her husband's property at his death) from constructing any buildings which interfered with the flow of light to the windows of one of his workshops. When the defendant acted on that claim by knocking down a fence which the plaintiff had erected, she brought an action in trespass, seeking an injunction. At trial, the Vice Chancellor found that no such easement had been reserved by Tetley when he conveyed the land to the plaintiff's husband and accordingly the plaintiff prevailed. The defendant appealed.

In dismissing the appeal, Thesiger L.J. took the opportunity to review comprehensively the case law on the question of implied easements. His conclusion has become the leading statement of general principles: "We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which

have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted.

NOTE: My emphasis. A quasi easement is a right which would be an easement but for the fact that the dominant and servient tenements are owned by the same person.

The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant....[Thus] an implied grant must be distinguished from an implied reservation: as a result of the principle that "a man cannot derogate from his own grant ... as a general rule no implication can be made of a reservation of an easement to the grantor, although there may be an implication of a grant to the grantee". Later he said: "in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favour of the grantor of land".

****

EXCEPTIONS, AND ONE ADDITION, TO THE GENERAL RULES ON IMPLIED GRANTS AND RESERVATIONS

In the passage quoted above Thesiger L.J. referred to exceptions to the general rules, and cited one - "ways of necessity." The others are discussed below. "Ways of necessity" are rights of way to land that would otherwise be landlocked. Because of the fiction that all easements are created in a grant, the traditional position of the common law was that even an access right to otherwise landlocked land was the product of the intention of the parties, not a result of some public policy. In the vast majority of cases courts have professed to find such an intention. You can see the application of this doctrine in the Wilkes v. Greenway case, discussed in the chapter on adverse possession. The successful adverse possessor did not gain an easement because there was clearly no intention among the parties that he do so. Some commentators and judges have suggested that public policy (a policy of utilisation of land by the owner) ought to require an easement of necessity in such circumstances, but this position was rejected by the English Court of Appeal in Nickerson v. Barraclough [1981] 1 Ch. 246 (C.A.), a case in which the normal implication of intention was specifically negatived by a clause in the conveyance.

In Ontario the Road Access Act, R.S.O. 1990, c. R-34 effectively provides a statutory easement of necessity. Sections 2 and 3 of the Act provide:

2. (1) No person shall construct, place or maintain a barrier or other obstacle over an access road, not being a common road, that, as a result, prevents all road access to one or more parcels of land or to boat docking facilities therefor, not owned by that person unless

(a) that person has made application to a judge for an order closing the road ...;

(b) the closure is made in accordance with an agreement with the owners of the land affected thereby;

(c) the closure is of a temporary nature for the purposes of repair or maintenance of the road; or

(d) the closure is made for a single period of no greater than twenty-four hours in a year for the purpose of preventing the acquisition of prescriptive rights.

2. (2) No person shall construct, place or maintain a barrier or other obstacle over a common road that as a result prevents the use of the road unless

(a) that person has made application to a judge for an order closing the road ...;

(b) the closure is of a temporary nature for the purposes of repair or maintenance of the road.

3. The judge may grant the closing order upon being satisfied that the closure of the road is reasonably necessary to prevent substantial damage or injury to the interests of the applicant or is reasonably necessary for some purpose in the public interest and the judge may impose such terms and conditions as the judge considers are reasonable and just under the circumstances, including a requirement that a suitable alternate road be provided.

In reviewing the material below on the other three exceptions, you should note that judges and writers on the subject may organise them differently than is done here, but the substance of what they say is the same.

The second exception is that of mutual easements. An obvious example is one of support enjoyed by two houses built touching each other. Another example is discussed in Balfour and Mendes da Costa, Property Law: Cases Texts and Materials:

'Thesiger L.J. further considered the question of whether there were other exceptions to the principle against implied reservation and discussed, in this connection, Pyer v. Carter (1857), 156 E.R. 1472 (Exch.).... Thesiger L.J. had summarized the facts of the case as follows:

"A house was conveyed to the Defendant by a person who was the owner of that house, and also of the house which was subsequently conveyed to the Plaintiff; and there had been during the unity of the ownership the enjoyment of the easement of a spout which extended from the Defendant's premises over the Plaintiff's premises, and by which water was conveyed on to the latter. But it is material to observe that the water when it came on to what were subsequently the

Plaintiff's premises was conveyed into a drain on the Plaintiff's premises, which drain passed through the Defendant's premises, and in that way went out into the common sewer. Subsequently the house over which this easement existed was conveyed to the Plaintiff, and upon an obstruction of the drains in the Defendant's house, which, be it observed, immediately caused a flooding of the Plaintiff's house by the very water coming from the Defendant's house, the Plaintiff brought his action, and it was held there that the Plaintiff was entitled to maintain his action, and that upon the original conveyance to the Defendant there was a reservation to the grantor of the right to carry away this water which came from the Defendant's premises by the medium of the drain which also went through his premises".

He then said of Pyer: "I cannot see that there is anything unreasonable in supposing that in such a case, where the Defendant under his grant is to take this easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied."'

The third exception is provided by situations in which it is necessary to imply the reservation of an easement in order to permit a grantor to fulfill his or her obligations to a grantee in a simultaneous sale of two pieces of land. Again, Balfour and Mendes da Costa's discussion of Wheeldon deals with this exception:

'Thesiger L.J. also alluded ... to the question of easements implied in the case of simultaneous grants where the grantor, instead of severing part of his land and retaining the rest, conveys all his land to two or more grantees at one time. He referred to Swansborough v. Coventry (1832), 131 E.R. 629:

"That was a case of a sale by auction of different lots to different persons at the same time, and it was argued (and I particularly direct attention to this) that such a case must stand upon exactly the same footing as if the land in respect of which the easement was claimed had been conveyed first; consequently the case would be one in which a grant of the easement would be implied. Now observe what that admits, and the argument so dealt with upon that footing. It admits that priority in time of the conveyance was a material point for consideration, because, if it had not been admitted, then the Court might have gone to the general question, not whether the conveyances were at the same time, not whether one preceded the other by a few minutes, or a few days, or by a few years, but whether upon the severance of the property there was this (if I may use the expression) continuous and apparent easement in respect of which a reservation might be claimed, or an implication of a grant might be made. Lord Chief Justice Tindal deals with the matter, as it appears to me, upon the supposition that the general maxim is that a man who conveys property cannot derogate from his grant by reserving to himself impliedly any continuous apparent easements; he says 'It is well established by the decided cases that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land and sells the house to another person, although the lights be new he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or

THE SCOPE OF EASEMENTS, AND TERMINATION

1) An easement granted for one purpose cannot be used for another. See *Malden Farms Ltd.* v. *Nicholson* (1956), 3 D.L.R. (2d) 236 (Ont. C.A.). In 1916 the owner of the servient tenement granted the owner of the dominant tenement (which was farmland) a right of way across his land for persons, animals and vehicles. In the early 1950's the successor in title to the dominant tenement began to develop the land as a beach resort, and the right of way was used by increasingly large numbers of vehicles. The Court of Appeal sustained an injunction granted to the successor in title to the original owner of the servient tenement. Aylesworth J.A. noted that the applicable principles were to be found in Gale on Easements:

According to the present state of the authorities, it appears that the grantee of a right of way is not entitled to increase the legitimate burden. But, on the other hand, the legal extent of his right may entitle him to increase the amount of inconveniences imposed upon the servient tenement e.g., by placing on the dominant tenement new buildings or increasing the size of old buildings. And the legal extent of the right (in other words, the mode as distinct from the extent of user) must, it seems, be ascertained from the intention of the parties at the time when the right was created.

He then held that "the burden of the easement has been markedly increased.... [It] is now burdened, not with a private right of way in favour of appellant, his heirs and assigns, as originally contemplated, but with a use of the way for appellant's commercial purposes by great numbers of the public who travel over respondent's lands much as though the same constituted a public highway or a busy toll road." Thus the appellant's use of the right of way was an "unauthorized enlargement and alteration in the character, nature and extent of the easement."

See also Re Gordon et al and Regan et al (1985), 15 D.L.R. (4th) 651 (Ont. H.C.). The parties were each entitled to a right of way over a mutual private drive to reach their respective lots. In 1922 the predecessors in title to one of the parties had bought some adjoining land and built a garage on it and then used the drive to reach that land also, which practice was continued by the party in this action. But he now wanted to convert the house into two semi-detached houses and to allow the purchasers of the second house to use the right of way to get to the adjoining land and garage. Griffiths J. held first that a right of way remains attached to each part of a dominant tenement if it is sub divided and that, absent any specific restrictions in the grant, a reasonable increase in use is permissible. He then held that the proposed use was improper because a right of way appurtenant to one lot cannot be used colourably to reach a different, adjoining lot.

2) There are a number of ways to extinguish an easement. First, by statutory provisions allowing an application to the court for an order terminating the easement. While these are common with respect to restrictive covenants (see chapter seven below), few common law jurisdictions have such legislation for easements. In Canada only British Columbia does: *Property Law Act*, R.S.B.C. 1979, c. 340, s. 31 (2).

Second, an easement is terminated by operation of law if the purpose for which it is granted comes to an end, or if the right is abused (as in the *Malden Farms* case noted above), or if it was

granted with a time limit and the time expires, or if the owner of the dominant and servient tenement becomes the same person. Note, however, with respect to this last point that if the same person comes into possession of the two tenements under different estates, the easement will merely be suspended.

Third, an easement can be terminated by release, express or implied. The burden of proof is very high on the owner of a servient tenement who wants to argue implied release; merely showing that the use was stopped for some period of time will not suffice. The stoppage must amount to an abandonment of the easement. In Barton v. Raine, above, Thorson J.A. dealt thus with an argument that the easement that a period of non-use had terminated the easement: "the interruption in its use which occurred following the father's stroke did not impair that easement, which, once acquired, could only be lost by non-user on evidence clearly establishing an intention to abandon it. As pointed out by the trial Judge, the circumstances of the non-user in this case were not consistent in any way with an intention to abandon the right."

CHAPTER SEVEN

SERVITUDES PART II - RESTRICTIVE COVENANTS

INTRODUCTION

Restrictive covenants are, like easements, a form of incorporeal hereditament, or servitude. Begin with the notion that a covenant is an agreement under seal, one contained in a deed. In the context of real property law, it is an agreement by which one person agrees to do something, or not to do something, with his or her land, for the benefit of the other party. A covenant is therefore the opposite of an easement, where one person is given the right to use the land of another.

As with an easement created by express grant, we can use contract law to say that the terms of the covenant are enforceable between the original parties. But, again similarly to an easement, the issue is when the terms of the covenant become attached to the land, as part of title to it, and are therefore enforceable by and against successors in title to the original contracting parties. That is, at what point will the law consider the covenant to be an interest in land so that it can be enforced between parties who have no privity.

An obvious question which will occur to you at this point is - what is the difference between covenants and easements? I am not going to answer this fully at the moment, because the entire answer requires us to understand the whole chapter. But for the present you can usefully think of a covenant as an agreement containing terms and conditions that would not amount to an easement by the characteristics outlined in *Ellenborough Park* or because of the restrictions on negative easements noted in *Phipps* v. *Pears*. There are other differences, but the point is that covenants directly affect servient land, while easements only do so inferentially, and that covenants are potentially much wider in scope than easements - although there are limits on which type of covenants can go with title. We will see that covenants are much more difficult to enforce against successors-in-title than easements, and thus you would never attempt to argue that something like a right of way was a covenant.

A paradigm restrictive covenant (that's a term of art which will be explained later) would be a limit on the kind of development that one land owner could undertake. That is, you own land and sell half of it off. You know the purchaser would want to build something unsightly on it, such as a new modern structure, all glass and concrete which would dwarf your own elegant early twentieth century mansion. You don't object to all building, but you don't want something like this. You thus insert a clause in the conveyance that would prevent building what is known in the trade as, I believe, a 'Jackman'.

Covenants and easements are often used together, the former helping to reinforce the limits on the servient owner implied by the easement. For example, in the *Ellenborough Park* case, as well as granting the residents the right to use the park as a garden, the deed also contained a covenant by the original vendors "against building on the park and to the effect that the park should at all times remain as an ornamental garden".

At this stage we need to introduce some terms. The covenantor, the person who agrees to do something or not to do something with his or her land, has what is called the burden of the covenant. The covenantee, the person for whose benefit the covenant is made, has what is called the benefit of the covenant. Enforcing the burden and being able to enforce the benefit against or for a successor in title to the original party is known as running the burden or the benefit of the covenant.

Restrictive covenants are a form of private zoning. As Ziff succinctly puts it, they "can be useful instruments in the hands of a 'nimby' ": Ziff, *Principles of Property Law*, fourth edition, p. 401. Despite the introduction of public zoning they remain part of the law and are widely used. They are used for a variety of ends. They have been used in the past to enforce racial segregation - refer back to *Re Noble and Wolf*. Their principal past and present use has been to enforce class, not racial, segregation. This point is nicely illustrated by the judgment of Brodeur J in *Pearson* v. *Adams*, (1914), 50 S.C.R. 204. In a deed of sale of land on Maynard Avenue in Toronto it was stipulated that the lot was "to be used only as a site for a detached brick or stone dwelling house, to cost at least two thousand dollars, to be of fair architectural appearance and to be built at the same distance from the street line as the houses on the adjoining lots." Pearson bought a lot on the street and "erected a first-class private dwelling house costing approximately $14,000, over and above the value of the land." Adams wanted to build a 6-unit apartment house on the adjoining land, and Pearson applied for an injunction to prevent this. The issue was whether such a building was a "dwelling house" within the meaning of the covenant. A majority of the Supreme Court of Canada said that it was not. In the course of his judgment Brodeur J. stated: "When the contract was made, in 1888, apartment houses were not being built in the City of Toronto. There were flats and tenements which were used or leased by a certain class of the population. There was also the detached house which was used for the residence of one family. Those detached houses were necessarily more expensive than the others and were supposed to be used by a wealthier class of the community. There is no doubt that Mr. Maynard, when he opened the street in question and sold those lots, had in view the establishment of a nice residential quarter and those covenants were stipulated evidently for that purpose. He did not want to have any flats nor any tenements erected on those lots which would be occupied by two or three lessees."

Although rooted in notions of preserving neighbourhoods and environments at a certain "quality," covenants also serve environmental or conservation goals. Later in this chapter we will look more closely at one modern development - the statutory changes which permit people to create "conservation covenants."

We turn now to the rules on "running" covenants - enforcing them down the chain of title when there is no privity. Regrettably, the rules on running covenants are "unnecessarily complex and occasionally illogical": Ontario Law Reform Commission, *Report on Covenants Affecting Freehold Land*, 1989, p. 1.

The first rule to note is that the common law historically never allowed the burden of any covenant to run and this rule still pertains, although it has been criticised, a matter to which we will return later in this chapter. But for now, take it that while a landowner could enforce an agreement made with a neighbour on the basis of contract law, he or she could never enforce that same agreement

THE COVENANT MUST TOUCH AND CONCERN THE DOMINANT LAND

The land referred to here is the land of the covenantee, the land being benefitted. The leading definition of touch and concern is usually said to come from *Rogers* v. *Hosegood* [1900] 2 Ch. 388. There it was said that: "the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land".

What does this mean? First, "as regards mode of occupation" means that the covenant must relate to the use of the dominant land. It obviously relates directly to the use of the servient land, but the requirement is that in doing so it also affects the use of the dominant land. A covenant restricting development, for example, affects the mode of occupation (use) of the neighbouring dominant land if that dominant land is residential, by making it more pleasant to live there. In this sense it is very similar to the requirement that an easement must accommodate the dominant tenement. Both covenants and easements are "servitudes," they "serve" the dominant land.

Second, in saying that "per se, and not from collateral circumstances," it must affect the value of the dominant land, the definition is simply saying that the covenant must not be personal to the original covenantee. In some sense this is really just another way of saying that the covenant must serve the land as land.

A good illustration of the distinction between serving the land as land as opposed to being personal is the distinction between a prohibition on a type of use and a non-competition covenant. A covenant against fast food hamburger outlets in a residential area would be seen as touching and concerning, as preserving the character of a neighbourhood. But what if there was already a MacDonalds in a sub-division, and MacDonalds sold off part of its land with a proviso that no fast food restaurant be built on the land it had sold off? It would likely not touch and concern because it does not affect the mode of occupation of MacDonalds' land. More importantly for current purposes, it would be seen as what is sometimes called a "commercial-only" covenant, and one that is personal to MacDonalds, the current owner.

An aspect of the need for the covenant to serve the land and not a person is the rule that the covenant must affect use of the dominant land, and that it does not do so by restricting the identity of those who occupy land - see *Galbraith*, below. Note that in *Galbraith* the court relied on its earlier decision in *Noble and Wolf*. The covenant in the case was struck down in the Supreme Court of Canada not, according to the majority, because it was discriminatory, but because a covenant going to the identity of owners or residents is not about use and therefore does not touch and concern.

An additional requirement under touch and concern is that the covenant must affect 'private' land. That is, it must confer a benefit on specific lots of land, it cannot confer a general public benefit. This principle can be illustrated by *Austerberry v. Oldham* (1885), 29 Ch. D. 750 (C.A.). In 1837 a number of landowners in Lancashire agreed to construct a road through their lands. A company was formed to build the roads and it covenanted with the landowners to keep the road in good repair. Elliott was one of the landowners, and his land was bought by Austerberry in 1868. In 1880 Oldham Corporation bought the road from the company, with notice of the repair covenant. In 1881,

THE TERMINATION OF RESTRICTIVE COVENANTS

There are a number of ways in which a restrictive covenant can be ended. The simplest is that the covenant might have been designated as lasting only for a specified period of time. Another is that the owner of the two tenements may become the same person; in that case the covenant is extinguished and will not be revived by a later splitting of ownership. Note, however, that this does not apply in a building scheme. Third, since a restrictive covenant is an equitable interest in land it is susceptible to the doctrine of laches. Whether or not the delay in enforcing rights has been unreasonable is always a question to be decided on the facts of each case. On this the Ontario Law Reform Commission's 1989 *Report on Covenants Affecting Freehold Land* states at p. 50: "if the land has been used openly for many years, in a manner inconsistent with the covenant", it will "be presumed to have been released". Fourth, the courts will occasionally consider a covenant to have become obsolete through changes in the character of the neighbourhood.

Finally, some Canadian provinces (including Ontario, Alberta, British Columbia and P.E.I.) have legislation permitting an application to the court for modification or removal of a covenant. The permitted reasons for change vary from jurisdiction to jurisdiction, and in some cases include obsolence, thus likely subsuming the equitable rule noted above. In Ontario the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C-34, s.61 reads: "61 (1) Where there is annexed to land a condition or covenant that the land or a specified part of it is not to be built on or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land, any such condition or covenant may be modified or discharged by order of the Ontario Court (General Division)."

The leading case on the interpretation of what is now s.61 is *Re Beardmore* [1935] 4 D.L.R. 562 (Ont. C.A.). At issue were restrictive covenants in a building scheme which designated the type of buildings which could be erected. An application was made under what is now s. 61 to modify these restrictions and allow for the building of "double duplexes" and "four family dwellings". This was apparently needed because the owners were having great difficulty realising on the lots. The application was opposed by some home owners in the building scheme, but was successful at first instance. The court allowed the appeal. Masten J.A. accepted that the owners were having difficulty selling under the restrictions, but also noted that the opposing parties asserted that they only bought because of those restrictions: they argued that their property would lose value and that they would be deprived of amenities. Masten J.A. said that the guiding principle under the statute was that "the order should not be made unless the benefit to the applicant greatly exceeds any possible detriment to the respondents". Indeed, "the cases decided under the Act are consistent in making plain the extreme caution with which the jurisdiction in question is to be exercised".

A recent discharge case under the British Columbia legislation is *Parmenter* v. *British Columbia* (1993), 30 R.P.R. (2d) 302 (B.C.S.C.). Parmenter acquired land from the province in 1964 on a lease to purchase agreement. His right to purchase was conditional on his making certain improvements, which he did. When he applied to buy in 1974 he was told for the first time that the land was subject to a covenant restricting the uses of the land to agricultural purposes. He consented to the covenant because he did not wish to lose the time and money already invested in the land, but was unable to make a success of agricultural ventures. He applied to the government for removal of

the covenant, and the government agreed to do so if he paid $1,434,000. This was the difference between the appraised value of the land with the covenant and its value without it. Parmenter applied for removal of the covenant, which the court had power to do if "by reason of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete": *Property Law Act*, R.S.B.C. 1979, c. 340, s. 31 (2) (a).

The court allowed the application. It held that while the character of the land had not changed, the character of the neighbourhood had changed because of residential and recreational developments in and around nearby Cultus Lake. It mattered not that the nearest development was half a mile away. It also stated that Parmenter had shown by his unsuccessful efforts to farm the land that it was not suitable for this type of use, and that represented "material circumstances" which it took into account.

****

RESTRICTIVE COVENANTS AND COMPETING VALUES

As noted earlier, the content of covenants, the purposes they are used to achieve, can vary greatly. Many seek to preserve the look of neighbourhoods, or to conserve green space. While it is no longer possible to directly restrict who may buy land, increasingly covenants are used to do this indirectly. The study of their use in Kitchener from 1951 to 1991 discussed in Ziff, *Principles of Property Law*, p. 400, shows a steady rise in the use of covenants which limit or prohibit the building of affordable housing or of residences other than those for single family units. Other covenants have sought to prevent the building of group homes for schizophrenics and the like - see the examples and cases cited in Ziff, pp. 400-401.

An increasingly popular form of covenant is the so-called "conservation covenant". Of course many of the covenants we have looked at seek to conserve natural areas or artificial green space. But if one wanted to preserve a large area, perhaps the whole of one's land, there are difficulties given the common law rules that make a covenant a relation between parcels - there must be a dominant tenement, and the covenant must touch and concern some benefitted land. Somebody who wished to preserve a large tract could get around the covenant rules by selling the land to the government for a park, or to a conservation organization, and attach a condition. But legislation in many provinces now also permits the owner to keep the land while granting a conservation covenant to the government or such an organization, which is registered against title. The landowner still has the land, and undertakes to use it only in certain ways. The covenant holder has the power to enforce the covenant.

Conservation covenants get around the need for a dominant tenement because the legislation makes them an exception to the common law rules. It also allows for the enforcement of positive obligations. Ontario's *Conservation Land Act*, R.S.O. 1990, c. C.28, as am., permits an owner to enter into a covenant with a "conservation body" for "the conservation, maintenance, restoration or enhancement of all or a portion of the land or wildlife on the land". A "conservation body" can be a government agency, a municipality, an Indian band, a conservation agency, or a non-profit corporation. Other statutes permit conservation covenants for agricultural land, forests, wildlife

habitat, etc.

****

A SAMPLE RESTRICTIVE COVENANT

An example of a restrictive covenant is reproduced below. It is one attaching to the title of a family cottage property of a student in Property I many years ago. A few comments on it might be useful. First, note the language of the initial, granting, clause which indicates that it is part of a sale of land and attempts to annex the covenant to the land - "with the intention that the same shall run with the lands and be binding upon all subsequent owners..." This is sufficient to annex the benefit. Had the final quoted phrase not been there, with the clause ending at "assigns", it might not be annexed. It is also sufficient to indicate that the covenant is not personal to the covenantee, one aspect of the requirement that the covenant touch and concern the land of the covenantee.

Second, note the substantive clauses, one through four. The first, second and fourth are typical negative covenant terms - restrictions on what may be done with the land. The third substantive clause is interesting. An argument can be made that "neat design" lacks sufficient certainty. We did not deal with it (except earlier for *Re Noble and Wolf*) but there is a certainty requirement in covenants which is nowhere near as strict as that for conditions. It is more akin to the general certainty of terms requirement in contract law (which of course you have done or will do). But even under a looser certainty test there might be problems with "neat design". "Good appearance" may raise a certainty problem as well, and in addition it may run the risk of being positive in substance. If it means merely "initial" good appearance that's acceptable, but if it means "keep up" the appearance it would be in substance a positive obligation to maintain. Also on the positive/negative distinction, the $800 requirement looks positive but would almost certainly be considered negative. Nobody is required to spend $800; rather, any house built must cost that.

The last clause was originally the third one, but was crossed through, and the numbers of what are now the third to fifth clauses were altered to keep the numerical sequence. The *Conveyancing and Law of Property Act* amendment which banned such covenants came into force on March 31, 1950, and this deed was registered on May 12, 1950. The lawyer must have known there was a problem with clause 6, else why move it to the end? Yet I am not sure what he or she thought would be gained by doing this. My best guess requires reference to the language of the statutory section. It says that discriminatory covenants "that but for this section would be annexed to and run with land" are "void and of no effect." And you will note that in the fifth clause of the covenant it says that any future conveyance of the lands will be subject to "the above restrictions" - that is, not number 6. Thus number 6 is not intended to run with the land, it is intended to be merely a personal covenant. Would enforcement of such a personal contract be contrary to public policy, either on general grounds or as an attempted end-run around the statute?

REGISTERED MAY 12, 1950. AND THE GRANTEES for themselves and their heirs, executors, Administrators and assigns, hereby Covenant, promise and agree to and with the said Grantor and his heirs, executors, administrators and assigns with the intention that the same shall run with the lands and be binding upon all subsequent Owners or Occupants thereof.

FIRSTLY: That the said lands shall be used for Residential Purposes only.

SECONDLY: That during a period of twenty years from the date hereof only one detached dwelling house may be erected and permitted to stand at any time on each lot as subdivided and laid out on the Registered Plan.

THIRDLY: That any dwelling house, private garage or other outbuildings erected on the said lands shall be of neat design and good appearance and that no dwelling house shall be erected or placed on the said Lands costing less than Eight hundred dollars exclusive of any garage or other outbuildings.

FOURTHLY: That no part of any building or erection of any kind other than fences or ornamental arches, pergolas or other similar structures shall be placed or erected upon the said lands within a distance of Eight feet from the limits of the parcel, other than the shore line.

FIFTHLY: That any Conveyance of the said lands hereafter made shall be subject to the above restrictions which shall be provided for and insured by Covenants in the above terms in any such deed made by and on behalf of the Grantees and their heirs executors Administrators and assigns and all successors in title and such Covenants shall be made to run with the said lands.

SIXTHLY: That no sale of the said lands or any part thereof shall be made at any time, to any person who is not a white Gentile nor to any Company or Corporation controlled or managed by other than white Gentiles.